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Land Rights in Kenya: The Role of Law in Protection against Forced Evictions

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Thesis presented for the degree of Doctor of Philosophy in the School of Law (Faculty of Commerce, Law and Management) at the University of the Witwatersrand, Johannesburg

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April 2024

Declaration

I, Stephen Chege Njoroge, declare that this thesis is my own work. It is submitted in fulfilment of the requirements of the degree of Doctor of Philosophy (PhD) in the Faculty of Commerce, Law and Management at the University of the Witwatersrand, Johannesburg. This thesis has not been submitted before for any degree or examination in this or any other university. I understand the University's policy on plagiarism. Where works by other people have been used, they have been properly acknowledged and referenced.

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30 April 2024

This thesis has been submitted with my approval as the Supervisor.

Dr. Khulekani Moyo Sign: …Signed……..

Date: 30 April 2024

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Any shortcoming in this work remains my sole responsibility.

Dedication

This thesis is dedicated to everyone who works to make Kenya a better country.

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Abstract

The land question in Kenya from the colonial to the post-colonial periods has direct implications to the prevalence of forced evictions affecting individuals and communities. Land laws and policies enacted during the stated periods contributed largely to the problem of forced evictions. The independence Constitution also did not address the problem. The promulgation of the Constitution of Kenya 2010 (the Constitution) however laid the basis for protection against forced evictions. The Constitution guarantees the right to housing, which is a component for protection from forced evictions as well as the right to dignity. However, it does not make provision for protection from forced evictions in the Bill of Rights. The legislature has not enacted substantive legislation on forced evictions. The courts have made efforts, though minimally, to infuse international standards on evictions in their decisions. This thesis interrogates the Kenyan legal framework, policies and institutions dealing with land and housing to identify their inefficiencies in protecting against forced evictions and has suggested recommendations for reform.

The thesis establishes that Kenyan law inadequately protects individuals and communities against forced evictions. The thesis answers questions: (i) what are the limitations of the legal and institutional framework in addressing the problem of forced evictions in Kenya? (ii) what are the legal and policy measures that are necessary to mitigate the problem of forced evictions? (iii) what can Kenya learn from another comparable jurisdiction in addressing the problem? In answering the questions, the thesis provides a synopsis of issues related to forced evictions which include access to land and security of tenure. The thesis examines the genesis of the problem of forced evictions and its prevalence on individuals living in informal settlements, indigenous communities and other communities. Importantly, the thesis evaluates the impact of forced evictions on human dignity as well as interdependence of all rights to demonstrate that forced evictions have implication to other human rights.

The thesis discusses protection from forced evictions in international law through the International Covenant on Economic, Social and Cultural Rights, thematic instruments, regional human rights instruments and institutions and their relevance in incorporating international best practices towards addressing the problem of forced evictions in Kenya. The thesis also draws best practices from the South African legal framework, norms, jurisprudence and judicial developments with a view to recommending the incorporation of best practices on land rights and protection against forced evictions in Kenya.

This study is significant and breaks new ground because it measures the Kenyan legal framework against international norms and practices in the area of land rights and forced evictions. By drawing best practices, the study highlights the limitations and deficiencies in the Kenyan legal framework and provides options for reforms. The development of an appropriate legal framework with substantive and procedural safeguards on evictions for individuals and communities in Kenya serves as the original contribution of the study.

Abbreviations and Acronyms

ACHPR	African Commission on Human and Peoples' Rights
African Court	African Court on Human and Peoples' Rights
ADR	Alternative Dispute Resolution
AI	Amnesty International
CAEA	Court of Appeal for Eastern Africa
CAJ	Commission on Administrative Justice
CECM	County Executive Committee Member
CEDAW	Convention on the Elimination of all Forms of Discrimination against Women
CESCR	Committee on Economic, Social and Cultural Rights
CLA	Community Land Act
Crown	British Colonial Government
CRPD	Convention on the Rights of Persons with Disabilities
EAPCCL	East African Portland Cement Company Limited
ECHR	European Court of Human Rights
ECSR	European Committee of Social Rights
ELC	Environment and Land Court
ELCA	Environment and Land Court Act
ESTA	Extension of Security of Tenure
FAO	Food and Agriculture Organisation
FPIC	Free, prior and informed consent
ICESCR	International Covenant on Economic, Social and Cultural Rights
IHRL	International human rights law
ILO	International Labour Organisation
IPILRA	Interim Protection of Informal Land Rights Act
KAA	Kenya Airports Authority
KNCHR	Kenya National Commission on Human Rights
KNHREC	Kenya National Human Rights and Equality Commission
LA	Land Act
LCC	Land Claims Court
LLAA	Land Laws Amendment Act
LRA	Land Registration Act
LTA	Land Titles Act
MLPWHUD	Ministry of Lands, Housing, Public Works and Urban Development
MPRDA	Mineral and Petroleum Resources Development Act
NCWSC	Nairobi City Water and Sewerage Company
NLCA	National Land Commission Act
NLC	National Land Commission
OP-ICESCR	Optional Protocol to the International Covenant on Economic, Social and Cultural Rights

Para	Paragraph
Paras	Paragraphs
PIE	Prevention of Illegal Eviction from Unlawful Occupation of Land Act
RLRA	Restitution of Land Rights Act
RTA	Registration of Titles Act
RLA	Registered Land Act
SERAC	Social and Economic Rights Action Centre for Social Rights
SERI	Socio-Economic Rights Institute of South Africa
SERs	Socio-Economic Rights
SC	Supreme Court
SCA	Supreme Court of Appeal
SAHRC	South African Human Rights Commission
The Charter	African Charter on Human and Peoples' Rights
TJRC	Truth, Justice and Reconciliation Commission
TRMA	Treaty Making and Ratification Act
UDHR	Universal Declaration of Human Rights
UN	United Nations
UNDRIP	United Nations Declaration on the Rights of Indigenous Peoples
UN-Habitat	United Nations Human Settlement Programme
UNGA	United Nations General Assembly
UNTS	United Nations Treaty Series

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CHAPTER 1

INTRODUCTION

1.1 Background to the Study

One of the contemporary problems related to land rights in Kenya is forced evictions. Individuals and communities have had to grapple with this phenomenon of which recourse to the law can provide pragmatic solutions to the problem. Kenya has an obligation to put in place laws and policies that recognise, respect and protect the rights of individuals and communities within their territories in line with international human rights obligations to protect them from forced evictions. The problem began at the onset of colonial rule. Kenya, among other African countries, accommodated a large population of European settlers who forcefully evicted and dispossessed local native communities of their lands.[1] Since then, forced evictions have been prevalent among occupants of informal settlements, indigenous peoples and other rural communities.

Forced evictions that are prevalent in urban areas caused by conflicts in land rights, non-payment of excessive land and house rents, and urban redevelopment.[2] Evictions are also prevalent among indigenous peoples and rural communities.[3] The colonial policies, laws and practices were exploitative, discriminatory, dehumanising and were only concerned with the land and natural resources rather than the welfare of the indigenous peoples who lived on such lands.[4] The quest for development from the colonial period to the present in African countries and Kenya in particular, has always had implications on indigenous peoples' land rights.[5]

The land problem can be traced from the colonial tenure system that made Kenyan native communities tenants at the will of the British Crown (the Crown).[6] That entailed that

[1] JCN Ashukem & C Ngang 'Land Grabbing and the Implication of the Right to Development in Africa' (2022) 22 *African Human Rights Law Journal* 404.

[2] KM Otiso 'Forced Evictions in Kenyan Cities' (2002) 23(3) *Singapore Journal of Tropical Geography* 252.

[3] AK Barume *Land Rights of Indigenous Peoples in Africa with Special Focus on Central, Eastern and Southern Africa* (2014) 89-132.

[4] Report of the African Commission's Working Group on Indigenous Populations/ Communities *Extractive Industries, Land Rights and Indigenous Populations'/Communities' Rights, East, Central and Southern Africa* (2017) Adopted by the African Commission on Human and Peoples Rights at its 58th Ordinary Session April 2016, the Gambia [8]-[11].

[5] Ibid 9.

[6] HWO Okoth-Ogendo *Tenants of the Crown: Evolution of Agrarian Law and Institutions in Kenya* (1991) 1-10. Okoth-Ogendo refers to the British colonial government as the British Crown.

Africans only had user rights and not legal rights to the land that they customarily owned.[7] Kenyan communities could not exercise any right to sell, lease, and enter into any treaty or arrangement for a title they were considered not to possess. Along the ten-mile coastal strip, the Crown devised methods to legitimise compulsory acquisition of land causing landlessness among the inhabitants at the coast.[8] The colonial handling of land was the source of contestation over land and the problem of tenure insecurity that exists among communities to date.

The Constitution of Kenya (the Constitution)[9] recognises the right to an adequate standard of living which includes the right to housing.[10] Rights and fundamental freedoms are inherent to every individual and place upon all governments a role to respect, protect and fulfil them.[11] Regional and international human rights instruments recognise the right to property among other land related rights.[12]

The International Covenant on Social Economic and Cultural Rights (ICESCR) recognises the right to adequate standard of living including housing and the continuous improvement of living conditions.[13] The African Charter of Human and Peoples' Rights (the Charter) as a regional human rights instrument provides a guarantee to the right to property.[14] The right to property is a bulwark in protection against forced evictions. The role of the African Charter in protection against evictions will be discussed in Chapter 3.[15]

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[7] Ibid 12.

[8] T Ojienda & M Okoth, 'Land and the Environment' in PLO Lumumba et al (eds) *The Constitution of Kenya: Contemporary Readings* (2011) 159.

[9] Republic of Kenya *The Constitution of Kenya* (2010).

[10] Article 43(1) (b) which provides that 'every person has the right to accessible and adequate housing, and to reasonable standards of sanitation.'

[11] PK Mbote *Fallacies of Equality and Inequality: Multiple Exclusions in Law and Legal Discourses* (2013) 4-5.

[12] African Charter on Human and Peoples' Rights 27th June 1981 UNTS 1520 (the Charter). Article 14 provides that the right to property shall be guaranteed. The right can only be encroached only in the general interest of the community or public need. Apart from the Charter, it is important to note that most of the international human rights instruments e.g. the ICCPR and ICESCR are silent on the right to property. The issue of the right to property is mainly regulated by municipal law.

[13] The International Covenant on Social Economic and Cultural Rights (ICESCR) (adopted 16 December 1966, entered into force on 3rd January 1976) UN Doc A/6316 Article 11.

[14] The African Charter (note 12 above) Article 14. The Article provides for the right to own, hold and dispose of property; MK Mbondenyi *International Human Rights and their Enforcement in Africa* (2011) 21. Mbondenyi opines that protection and promotion of human rights cannot be effectively discussed without recognising the efforts done at the regional level.

[15] Section 3.5.1 of Chapter 3.

Individuals and communities live in conditions that do not uphold their rights and are either forcefully evicted or are threatened with forceful evictions.[16] The evictions take place where persons are involuntarily removed from their land either directly or indirectly through acts by the state or by non-state actors. The possibility of residing in a place, residence or a particular house is usually limited and insecure.[17] The United Nations (UN) Committee on Economic, Social and Cultural Rights (CESCR)[18] has defined forced evictions as 'the permanent removal against their will of individuals, families and or communities from the homes which they occupy without the provisions of, and access to, appropriate forms of legal and other protection.'[19] The components of forced evictions have been elaborated in the following manner:

> …forced evictions constitute gross violations of a range of internationally recognised human rights, including adequate housing, food, water, health, education, work and security of the person, security of the home, freedom from cruel, inhuman and degrading treatment, and freedom of movement. Evictions must be carried out lawfully, only in exceptional circumstances, and in full accordance with relevant provisions of international human rights and humanitarian law.[20]

Forced evictions happen in both developed and developing countries and can be attributed directly or indirectly to actions by the State and actions by non-state actors. States are responsible due to specific decisions, legislations, policies and omissions to prevent forced evictions committed by the State or non-state actors.[21] Forced evictions are connected to tenure insecurity or lack of formal title to land as well as development and infrastructure initiatives done by the State and non-state actors.[22]

Land is a factor of production and land rights are linked to other rights that are enjoyed by both individuals and groups. Forced evictions have socio-economic, cultural and political consequences. They include individual and social impoverishment, homelessness, physical

[16] F Kariuki, S Ouma & R Ngetich *Property Law* (2016) 418-421.
[17] Ibid 419.
[18] The CESCR is a UN body composed of independent experts who monitor the implementation of social economic and cultural rights by member states to the International Covenant on Economic, Social and Cultural Rights (ICESCR).
[19] CESCR 'General Comment No 7, Forced Evictions and the Right to Adequate Housing' (1997) UN Doc E/1998/22 Para 3.
[20] United Nations General Assembly (UNGA) 'Basic Principles and Guidelines on Development based Evictions and Displacement' (1997) UN Doc A/HRC/4/18 [Para 6].
[21] UN Habitat *Forced Evictions – Towards Solutions? Second Report of the Advisory Group on Forced Evictions to the Executive Director of UN-Habitat* (2007) < www.unhabitat.org> accessed 24 February 2018 [1].
[22] Ibid 3.

and psychological trauma, loss of traditional lands and important historical sites, loss of lives and livelihoods, among others.[23]

Forced evictions that are justified by development initiatives, which are supposed to benefit all people, mostly affect the people who have no formal title to land. Legitimate reasons that may justify evictions include development and infrastructural projects, land acquisition for development purposes, urban redevelopment, control of proliferation of slums, privatisation in housing and land, among others.[24] Forced evictions are also justified by mining and extractive activities, zoning and urban planning, large scale land acquisition, non- recognition of titles to land and housing which includes unsettled land claims, discriminatory laws and practices, poverty which leads to people living in informal settlements especially owing to rural urban migration among other reasons.[25]

International human rights law (IHRL) does not prohibit all evictions.[26] Prohibition of forced evictions by IHRL does not apply to evictions carried out in accordance with the national laws that conform to international human rights standards. In some instances, it is necessary to displace people from hazard-prone land to protect their lives, but the State agents should carry out the displacement in a humane manner.[27] In instances where courts rule in favour of an eviction or national legislation provides for evictions, the evictions become unlawful evictions if States or non-state agents do not adhere to international law norms and state obligations.[28]

This chapter describes land rights under Kenyan law and evaluates evolution of land law and policy as essential factors for laying the basis for the problem of forced evictions. It lays out the statement of the problem, the research questions, significance of the study and research methodology. The chapter reviews the literature to be investigated and the gap of knowledge to be filled under the themes of imposition of English law, rights related to land and best practices in dealing with forced evictions. The chapter also provides the conceptual framework of the study and the scope of the study.

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[23] Otiso (note 2 above) 253-256.

[24] United Nations High Commissioner for Human Rights (UNHCHR) *Forced Evictions and Human Rights* (2014) <ohchr.org/documents/publications/FS25 > accessed 21 May 2018 [3] - [4]; Otiso (note 2 above) 253-256.

[25] Basic Principles and Guidelines on Development Based Evictions and Displacements (note 20 above) Paras 5, 8 & 9.

[26] UNHCHR 2014 (note 24 above) 5.

[27] Ibid.

[28] Ibid.

1.2 The Nature of Land Rights

Land rights bestow on an owner the liberty to deal with the property as they deem fit. This is because property denotes the bundle of rights that someone has over land. The rights can be summarised in terms of land tenure which entails the methods through which individuals or groups acquire, hold and dispose of land rights.[29] Land is an important aspect of life in society since it supports food production, security and the livelihoods of individuals and communities.[30] The following part discusses the aspects of access to land and security of tenure as important components of land rights.

1.2.1 Access to Land

Access and land ownership is a central aspect of development and political change. Indeed, most of the development that has taken place in African countries and Kenya in particular is related to the use of land.[31] Consequently, the need to effectively address the challenge posed by forced eviction cannot be overemphasised. This is because land is an important factor for economic, social and cultural development. The Sector Plan for Land Reforms underscored this fact, and states that:

> …land as a factor of production is the most important natural resource that Kenya is endowed with. It is critical to economic, social, political and cultural development. It is also considered as the principal source of livelihood and material wealth by playing host to natural resources. Secure access to land, sustainable land use planning and equitable distribution of land remains immensely important for food and nutrition security, employment, growth of industries, attraction of foreign investors, foreign exchange earnings and generally the socio-economic development of the country.[32]

Land is linked to sovereignty and has implications on the cultural, spiritual and religious lives of people.[33] Secure land rights should exist, especially in the absence of formal title to land. Individual landholders comprise a minority of the population and secure land rights are only enjoyed by a few people.[34] Land rights for the majority are insecure for a number of reasons. Firstly, the creation of private land rights from trust land owned by communities without their

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[29] PK Mbote & C Odote 'Innovating Tenure Rights for Communities in Informal Settlements: Lessons from Mukuru' in C Odote and PK Mbote (eds) *Breaking the Mould, Lessons for Implementing Community Land Rights in Kenya* (2016) 55.

[30] M Akech 'The Environment and the Courts in Kenya' 2006 *The Environment and Land Law Reports* 3.

[31] C Juma 'In Land We Trust: Introduction' in C Juma & JB Ojwang (eds) *In Land We Trust: Environment. Private Property and Constitutional Change* (1996) 1.

[32] Republic of Kenya *Sector Plans for Land Reforms 2013-2017* (2013) 1.

[33] PK Mbote 'The Land Question in Kenya: Legal and Ethical Dimensions' in EW Gachenga *et al* (eds) *Governance, Institutions and the Human Condition* (2009) 224.

[34] Ibid 223.

consent, and secondly the creation of private holdings in group ranch areas without considering compatibility and interests of the broader community.[35] Insecure land rights have also been created by dispossessions associated with historical land injustices, exclusions and marginalisation of communities.[36]

Land is a cross-cutting issue, and impacts on a significant number of human rights protected under both domestic constitutions and under international human rights legal framework.[37] Land rights have been established in the international legal framework that relate to land access not only for individuals but also for particular groups, such as indigenous peoples and numerous rights such as housing, food, water affected by access to land. The general principles of international law such as equality and non-discrimination in ownership provide protections that relate to access to land.[38] The implication is that forced evictions affect other rights such housing, food, water and work.

1.2.2 Security of Tenure

Land tenure refers to the rights that individuals and communities have over land and land based resources in relation to people, time and space. Land tenure defines the range of persons who control and manage land and land resources.[39] Land tenure best captures the right to property and formal tenure connotes the nature and contents of property rights, and determines how individuals hold land and land resources and the conditions under which the land is held.[40] It has been defined as the terms and conditions in which rights to land are acquired, used, disposed of or transmitted.[41]

According to the Food and Agricultural Organisation (FAO), land tenure constitutes a web of intersecting interests which includes overriding interests by sovereign and overlapping interests when different parties share different rights in the same land. Land tenure further

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[35] Ibid.

[36] HWO Okoth-Ogendo 'The Tragic African Commons, a Century of Expropriation, Suppression and Subversion' in *Land Reforms and Agrarian Change in Southern Africa: An Occasional Paper Series* (2002) 5-9. Okoth-Ogendo argues that Africa's rural poor people operate under conditions of tenure insecurity which is a direct outcome of a century of suppression, subversion and marginalisation. The indigenous land tenure regimes were rendered incapable of performing important social and economic functions.

[37] E Wickeri & A Kalhan 'Land Rights Issues in International Human Rights Law' (2010) 4 (1) *Malaysian Journal on Human Rights* 16-17.

[38] Ibid.

[39] K Muigua, D Wamukoya & F Kariuki *Natural Resources and Environmental Justice in Kenya* (2015) 133.

[40] FT Kalabamu 'Limits of Incremental Land Tenure Reform in Botswana' in R Home (ed) *Local Case Studies in African Land Law* (2011) 117-118. See also Mbote & Odote (note 29 above) 55.

[41] Republic of Kenya *Sessional Paper No 3 of 2009 on National Land Policy* (2009) 15.

constitutes complementary interests where parties share the same interests to land and competing interests in instances where different parties contest the same interests in a particular parcel of land.[42]

Security of tenure to land is defined as 'the degree of security which guarantees legal protection against forced evictions, harassment and other threats.'[43] Security of tenure is necessary for development and poverty reduction as well as assisting in accessing socio-economic rights (SERs). Tenure security is the certainty that will be accorded to an individual's right to land in circumstances of challenge. FAO elaborates the aspect of security of tenure by stating that:

> …security of tenure is the certainty that a person's right to land will be recognised by others and protected in different challenges. People with insecure tenure face the risk that their right to land will be threatened by competing claims, and even lost as a result of eviction. Without security of tenure, households are significantly impaired in their ability to secure sufficient food and enjoy sustainable rural development.[44]

Wickeri and Kalhan observe that security of tenure in the form of formal legal, customary or religious rights can provide more predictability and secure access to fundamental rights.[45] Wickeri and Kalhan further note that without secure land rights, individuals and communities live under the constant threat of arbitrary evictions.[46] Evictions impact a range of fundamental human rights, both civil and political rights as well as SERs.[47]

The problem of tenure insecurity can be traced from the dispossessions that took place when the Crown took over the affairs of the country as her colony.[48] The Crown seized land and evicted the native occupants and settled them elsewhere especially on non-productive land. The Crown used legal theories, especially the doctrine of *terra nullius*, which entails, empty land, which entails land that was not occupied or not rationally exploited, could be

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[42] Food and Agricultural Organisation (FAO) *FAO Land Tenure Studies 3, Land Tenure and Rural Development* <www.fao.org> accessed 5 March 2017 [7]-[8].

[43] General Comment No. 7 (note 19 above) Para 3. The CESCR observes that security of tenure does not necessarily require ownership but protection is guaranteed because of occupation.

[44] FAO (note 42 above) 18.

[45] Wickeri & Kalhan (note 37 above) 17

[46] Ibid.

[47] Ibid 22-23.

[48] C Polsinelli 'Right to Land-Right to House and Adequate Standard of Living' in *Human Rights Litigation and the Domestication of Human Rights Standards in Sub Saharan Africa* AHRAJ Casebook Series 1 (2007) 147-151.

expropriated to justify the dispossessions and evictions.[49] The second method involved the imposition of the notion of private property.[50] The aspect of private property replaced the traditional communal nature of landholding which in turn led to expropriation of the native communities' land rights.[51]

Onalo argues that registration of title and possession of title documents to land enables an individual to enjoy security of tenure and exclusive possessory rights over land.[52] Onalo further argues that holders of a formal title to land are assured of ownership with ease since registration of title documents ascertain the tenure, the mode of land holding, the size or acreage.[53] Ogolla and Mugabe observe that the policy of the government has been to replace customary tenure of land holding with a modern or private tenure through adjudication and registration of titles to improve security of tenure.[54] Despite efforts to assert private tenure to land, customary land tenure is still dominant and persists because customary norms, values and practices are still vibrant in areas where registration of titles has been completed.[55]

1.2.3 The Nature of Land Rights under Kenyan Law

The Constitution, legislation, policy and institutional arrangements in Kenya are inadequate in protecting people from forced evictions as will be demonstrated below.[56] The Constitution has an elaborate Bill of Rights and makes general provisions on access to land that seek to guarantee security of land rights. The Constitution also designates land tenure into public, private and community.[57] An in-depth analysis of the three categories of land tenure in Kenya is discussed in Chapter two of this thesis.[58] Though the Constitution makes provision on

[49] K Sing'oei 'Disarming the Leviathan: Endorois Decision and the Search for Inclusive Social-economic Rights in Kenya' in *Judicial Enforcement of Social-economic Rights under the New Constitution: Challenges and Opportunities for Kenya* (2011) 314.
[50] Polsinelli (note 48 above).
[51] PK Mbote *Property Rights and Biodiversity Management in Kenya: The Case of Land Tenure & Wildlife* (2002) 1-10; Mbote (note 11 above) 22.
[52] P Onalo *Land Law and Conveyancing in Kenya* (1986) 173.
[53] Ibid.
[54] BD Ogolla & J Mugabe 'Land Tenure Systems and Natural Resource Management' in C Juma & J.B Ojwang (eds) *In Land We Trust: Environment, Private Property and Constitutional Change* (1996) 97.
[55] Ibid.
[56] *Satrose Ayuma & 11 Others v. Registered Trustees of the Kenya Railways Staff Retirement Benefits Scheme & 3 Others* Petition No 65 of 2010 Para 79. The High Court observed that Kenyan law was inadequate in governing evictions whether forced or otherwise. The court had to consider international law and emerging jurisprudence from other countries. The court observed that it was good practice to seek guidance from international law in instances where municipal law is silent and/or inadequate in addressing an issue.
[57] Articles 61-64 of the Constitution.
[58] Section 2.3.3 of Chapter 2.

access to land and elaborates the three forms of land tenure, it does not make provision relating to protection from forced evictions.[59]

The Kenyan legal framework includes the Constitution. The Constitution establishes independent commissions, the Kenya National Human Rights and Equality Commission (KNHREC).[60] The legislations regulating land use and these include the Land Registration Act (LRA),[61] the Land Act (LA),[62] the National Land Commission Act (NLCA)[63] and the Community Land Act (CLA).[64] The main institutions that regulate land use include the Ministry of Lands, Public Works, Housing and Urban Development,[65] the National Land Commission (NLC)[66] and the Environment and Land Court (ELC) established under the Constitution and the enabling legislation, the Environment and Land Court Act (ELCA).[67] The policy documents include the National Land Policy,[68] the National Land Use Policy[69] and the National Housing Policy.[70]

The Constitution provides that land should be 'held, used and managed in a manner that is equitable, efficient, productive and sustainable in accordance with the principles of equitable access to land and security of land rights.'[71] Land is to be held, used and managed in accordance with the principle of among others, security of land rights and equitable access to land.[72] The Constitution recognises SERs which include the 'right to accessible and adequate housing, and to reasonable standards of sanitation.'[73]

[59] OA Angote 'Evictions in Kenya: Which Way under the New Constitution and the Land Laws (Amendment) Act 2016?' (2018) 2(2) *Journal of Conflict Management and Sustainable Development* 61-62.
[60] Article 59 of the Constitution establishes the Kenya National Human Rights and Equality Commission (KNHREC). Sub-Article 4 provides that parliament shall enact legislation to restructure KNHREC into two or more separate commissions.
[61] Act 3 of 2012.
[62] Act 6 of 2012.
[63] Act 5 of 2012.
[64] Act 27 of 2016.
[65] Republic of Kenya *Executive Order No. 1: Organisation of the Government of the Republic of Kenya* (2023) 31.
[66] The NLC is established under Article 67 of the Constitution. The enabling legislation is the NLCA Act 6 of 2012.
[67] The ELC is established under Article 162 (2) b of the Constitution. The enabling legislation is the ELCA Act 19 of 2011.
[68] The National Land Policy (note 41 above).
[69] Republic of Kenya *National Land Use Policy* (2016).
[70] Republic of Kenya *Sessional Paper No. 3 National Housing Policy for Kenya* (2016).
[71] Article 60 (a) and (b) of the Constitution.
[72] Ibid.
[73] Ibid Article 43 (1) b.

The Constitution defines both land and property.[74] The definition given to property connotes both rights and interest to land. The right to property is an important component of the Bill of Rights. Every person has the right to own property either individually or in association with other people. The Constitution provides that 'parliament shall not enact a law that would arbitrarily deprive a person of property or limit or restrict the enjoyment of any right.'[75] Deprivation of property by the State should only be accompanied by prompt payment of just compensation to the owner. In case of any dispute in exercise of the power of *eminent domain* by the State, the law allows access to the courts for redress.[76] The right to property as a component of protection from forced evictions will be discussed in Chapter 4 of this thesis.[77]

The following section evaluates the evolution of land law and policy in Kenya.

1.3 Evolution of Land Law and Policy in Kenya

Kenyan communities had their own legal systems that governed land management based on their customs and practices in the pre-colonial period. Community leaders, clan elders and chiefs exercised authority in enforcing the system.[78] The system of land holding was based on clan solidarity where public interests could not be subordinated to private interests. There existed lineal heritage where land could pass from one generation to another.[79]

The conquest of the Kenyan territory and the introduction of English property law that laid emphasis on private ownership of land subdued the traditional tenure system that had been established over decades.[80] The British conquered East Africa in the late 1880s, declared it a protectorate known as the British East Africa Protectorate and subsequently declared Kenya as a colony in 1920.[81] The communities were declared tenants at the will of the Crown.[82] The

[74] Ibid Article 260. It defines land to include the surface of the earth and the subsurface rock, any body of water on or under the surface, marine waters in the territorial sea and exclusive economic zone, natural resources completely contained or under the surface and air space above the surface. It has defined property to include any vested or contingent rights to, or interest in and arising from land or permanent fixtures on or improvements to land.

[75] Article 40 (1) and (2) of the Constitution.

[76] Ibid Article 40 (3).

[77] Section 4.5 of Chapter 4.

[78] PLO Lumumba & L Franceschi *The Constitution of Kenya 2010: An Introductory Commentary* (2014) 263.

[79] KM Doyle 'Customary Land Rights in Kenya in the Context of History: From Colonial through Independence, From Jomo Kenyatta to Uhuru Kenyatta' in C Odote & PK Mbote (eds) *Breaking the Mould, Lessons for Implementing Community Land Rights in Kenya* (2016) 11.

[80] L Juma 'Ethnic Politics and the Constitutional Review Process in Kenya' (2002) 9 *Tulsa Journal of Comparative and International Law* 480-481.

[81] Doyle (note 79 above) 12.

Crown asserted that it had the original title to the entire territory, and not the local people who had been in occupation for centuries.[83] The term Crown land entailed land that was under the control of the King of England by virtue of treaties, conventions and agreements between the Crown and the native local communities.

Introduction of English property laws and policies eroded the traditional land tenure patterns.[84] The laws and policies gave exclusive rights to the Crown on land that was occupied by Kenyan communities. The implication was that the Crown alienated land, forcefully removed and relocated them to lands that were unproductive.[85] Kangethe observes that following colonisation by the Crown, white farmers forcefully displaced Kenyan communities from productive areas and settled there, giving rise to the 'white highlands.'[86] The white highlands referred to land that had been alienated to the white settlers. The white highlands had a tropical climate suitable for cash crop farming. Wayumba describes the white highlands and demonstrated the reasons that justified alienation of land for the benefit of the Crown by stating that:

> … the highlands of Kenya had a temperate climate and provided scope for high veld pastoralism. There were also other parts of the country with a tropical climate, suitable for various tropical raw materials such as; cotton, rubber, cocoa, coffee and sugar cane. Because of its peculiar geography and variation in climate, Kenya seemed to represent a confluence of several streams of colonial development both temperate and tropical.[87]

The Crown enacted laws to govern land registration, a departure from informal communal ownership into formal individual ownership.[88] The laws governed private land, trust land as well as government land. The Crown restructured property rights in the reserves where communities were concentrated by introducing individual tenure and intensifying agricultural

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[82] Okoth-Ogendo (note 6 above) 1-5.

[83] Ibid.

[84] J Lonsdale & B Berman 'Coping with the Contradictions: The Development of the Colonial State in Kenya, 1895-1914 20 *Journal of African History* (1979) 498. See also S Wanjala 'Recurrent Themes in Kenya's Land Reform Discourse since Independence' in S Wanjala (ed) *Essays in Land Law: The Reform Debate in Kenya* (2000) 28.

[85] T Kanogo *Squatters and the Root of Mau Mau 1905-63* (1987) 8-10.

[86] D Kangethe *An Evaluation of the Effects of Land Tenure on Land Use in Kenya: Evidence of Bondo, Busia and Siaya Districts* (2012) 2.

[87] G Wayumba 'The White Highlands and the Establishment of the African Settlement Schemes in Kenya' (2019) 5(6) *International Journal of Innovative Studies in Sciences and Engineering Technology* 47.

[88] In a bid to guarantee security of tenure, the Crown enacted several legislations. They included the Crown Land Ordinances of 1902 and 1915. The Crown Land Ordinance became the Government Land Act, Cap 280 Laws of Kenya. The Land Titles Act of 1908 administered land along the Kenyan ten-mile coastal strip. The Crown further enacted the Registration of Titles Act in 1920.

production in other areas through the Swynnerton Plan (the Plan).[89] The intention of the Plan was to ensure that the communities on their small plots realise sufficient returns so that they abandon demand for redistribution of land that the Crown held.[90] An in-depth analysis of the Plan and laws, both colonial and post-colonial, are discussed in Chapter 4 of this thesis.[91]

The outbreak of the *Mau Mau* war in 1952 against the Crown was mainly due to land grievances.[92] The war was also brought about by the destruction of traditional land tenure patterns and increase in pressure on land occupied by Kenyan communities, which was largely unproductive.[93] Berman asserted that the war was a defensive struggle to stem the tide of land losses and open access to the sphere of commodity production blocked by the State's development policies, the European settlers and wealthy African farmers.[94] The rebellion ended in 1960 at the onset of the Crown's agreement to grant independence to Kenya. The Bill of Rights that was negotiated at independence and adopted as part of the Independence Constitution did not guarantee land rights but instead, lay emphasis on the 'willing buyer willing seller' approach instead of restitution of land that had been alienated. The country was even offered credit to facilitate the buyouts.[95]

During the time when independence was inevitable, the Crown ensured that individualisation of land tenure and status quo was enhanced through legal and policy framework. Lenaola et al., elaborates the essence of retention of the status quo by stating that:

> …at the time that independence became inevitable, the colonial government sought to retain the legitimacy and security of this property regime by encouragement and co-option of an indigenous elite which had come to benefit from it. The African sector that took over control of the country following independence were those that would also gain the most by the continuity of the economic and political colonial system.[96]

The Registered Land Act (RLA)[97] was enacted upon independence in 1963 and was principally meant to unify the existing systems of land registration.[98] The land registration

[89] Swynnerton RJM *A Plan to Intensify the Development of African Agriculture in Kenya* (1954).
[90] Okoth-Ogendo (note 36 above) 69.
[91] Section 4.3.1 of Chapter 4.
[92] B Berman *Control and Crisis in Colonial Kenya: The Dialectic of Domination* (1990) 361-371.
[93] Kanogo (note 85 above) 125-155.
[94] Berman (note 92 above) 363.
[95] Doyle (note 79 above) 13.
[96] I Lenaola, H Hadley H. Jenner & T Wichert 'Land Tenure in Pastoral Lands' in C Juma and JB Ojwang (eds) *In Land We Trust: Environment, Private Property and Constitutional Change* (1996) 238.
[97] Cap 300 Laws of Kenya (now repealed).
[98] Onalo (note 52 above) 177.

legislation included the Registration of Titles Act (RTA),[99] Land Titles Act (LTA)[100] and the Government Land Act (GLA).[101] The RLA did not achieve unification of the registration regimes and operated alongside the RTA, LTA and GLA until repeal of the four legislations by the LRA in 2012. The RLA, similar to RTA, LTA and GLA recognised individual land tenure and was an embodiment of English property law to the detriment of indigenous peoples and communities whose communal way of life was incompatible with its provisions.[102]

Post-independence Kenya did not have a land policy until the formulation of the National Land Policy (the Policy) in 2009.[103] The Policy is significant because it articulates principles that were adopted by the Constitution. The Policy recognises that the land question had manifested itself in many ways which included fragmentation, breakdown in land administration, disparities in land ownership and poverty.[104] The land question also led to problems which include deterioration of land quality, squatting and landlessness, disinheritance of individuals and groups, tenure insecurity and conflict among others.[105] The Policy did not address the problem of forced evictions adequately.

The Policy recognises that for the country to establish a firm foundation for land policy reform, the Constitution should protect human rights for all, genuine historical and current land injustices should be resolved and there should be security of tenure.[106] The Policy also recognises that protection of human rights for all and more particularly the rights of women, minorities, children and persons with disabilities with respect to access and ownership of land is an important aspect.[107] The individuals and groups affected by forced evictions are a vulnerable segment of Kenyan society, and are in most cases discriminated against.

The Policy states that the 1969 Constitution (the independence Constitution)[108] did not make recognition of land as a unique entity and just categorised it with other categories of property.

[99] Cap 281 Laws of Kenya (now repealed).
[100] Cap 282 Laws of Kenya (now repealed).
[101] Cap 300 Laws of Kenya (now repealed).
[102] T Ojienda *Land Law and Conveyancing: Principles and Practice* (2015) 17; Lenaola et al (note 96 above) 239-241.
[103] The National Land Policy (note 41 above) IX.
[104] Ibid 8-9.
[105] Ibid.
[106] National Land Policy (note 41 above) 11.
[107] Ibid.
[108] The 1969 Independence Constitution was repealed by the Constitution of Kenya 2010.

The Policy set out the ideal situation for efficient and equitable framework for land ownership, management and management under a constitutional dispensation by stating that:

> …in an ideal situation, a constitution should set out broad principles for the governance of land, and establish an efficient and equitable institutional framework for land ownership, administration and management. Land policy reforms are not likely to succeed in the absence of such a sound constitutional framework. Accordingly, land reforms should be accompanied by constitutional reforms if they are to be effective.[109]

The Policy states that the need for land reforms arose from failure by the independence Constitution to establish an efficient, accountable and equitable institutional framework for land ownership, administration and management.[110] The failure had various implications on land relations which contributed to the problem of forced evictions. They include mass disinheritance of communities and individuals of their land, inequitable access to land, particularly for minority groups and constitutional protection of private property rights after illegitimate acquisition.[111] The Policy informed largely the provisions on land in the current Constitution.

The Bill of Rights in the Constitution makes elaborate provisions on land and environment.[112] The Constitution elaborates the principles of land policy.[113] It further classifies land as private, public and community and establishes the NLC which is mandated to recommend policy on land to the national government, manage public land on behalf of the national and county governments and address historical land injustices.[114] Pursuant to the provisions relating to land in the Constitution, parliament enacted land legislations which include the LA, the NLCA, the LRA, and the ELRA.

There have also been efforts to address the land problem. However, the hypothesis in this research is that the problem of forced evictions has not been adequately addressed by law and policy. One of the efforts to address the land question was the creation of the Truth, Justice and Reconciliation Commission (TJRC). TJRC was established by the Truth Justice and

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[109] The National Land Policy (note 41 above) 12.
[110] Ibid.
[111] Ibid.
[112] Chapters 4 and 5 of the Constitution; MK Mbondenyi 'The Bill of Rights' in PLO Lumumba et al (eds) *The Constitution of Kenya: Contemporary Readings* (2011) 61-97; T Ojienda & M Okoth, 'Land and the Environment' in PLO Lumumba et al (eds) *The Constitution of Kenya: Contemporary Readings* (2011) 153-179.
[113] Article 60 of the Constitution provides that land in Kenya shall be held, used and managed in a manner that is equitable, efficient, productive and sustainable.
[114] Ibid Chapter 5.

Reconciliation Act[115] which gave it the mandate to establish a record of human rights abuses by the State since the attainment of independence, explain the causes and recommend prosecution of the perpetrators of human rights violations and reparation for the victims of human rights abuses.[116]

The TJRC found that the Crown used both illegal and irregular methods including forced evictions of communities from their land, entrenching laws, policies and practices that had long term implications with regard to land dispossessions from communities.[117] The TJRC also made an important finding that the provincial administration had committed injustices including forced evictions, and recommended that the administration should be involved in the efforts to address the land related problems.[118]The establishment of the TJRC was a culmination of the Kenya National Dialogue and Reconciliation process of 2008 which recommended that land and historical injustices be addressed.[119]

The government established the Commission of Inquiry into the Land Law System of Kenya on Principles of a National Land Policy Framework and the Constitutional Commission on Land and the New Institutional Framework for Land Administration (the Commission) in 1999. The government formed the Commission upon realisation that Kenya had been operating without clear policy guidelines concerning land. The Commission delivered its final report to the public in 2002.[120] The Commission did not address the aspect of forced evictions though it made recommendations regarding other aspects relating to land.

The government also established the Commission of Inquiry into the Illegal/Irregular Allocation of Land (the Commission) in 2003 to investigate illegal and irregular allocation of public land.[121] The Commission's main mandate was to inquire into illegal and irregular allocation of public land, to provide recommendations to the government for restoration of the illegally and irregularly allocated land, and to offer other solutions that were

[115] Act 6 of 2008.
[116] Ibid Sections 5-8.
[117] *The Truth Justice and Reconciliation Summary Report* (2013) <www.accordinternational.org> accessed 28 February 2018.
[118] Ibid.
[119] M Mbaru 'The Independent Review Commission on the 2007 Elections: Its Impact on Institutional Reform' in the International Commission of Jurists Kenyan Section *The Rule of Law Report* (2008) 2-6.
[120] Republic of Kenya *Report of the Commission of Inquiry into the Land Law System of Kenya on Principles of a National Land Policy Framework, Constitutional Position on Land and New Institutional Framework for Land Administration* (2002).
[121] Republic of Kenya *Report of the Commission of Inquiry into the Illegal/Irregular Allocation of Land* (2004) 1-2.

appropriate.[122] The Commission made findings that are relevant to this study. Firstly, the Commission recommended that Kenya should devise a secure system of issuance of formal titles to land.[123] Secondly, the Commission established that illegal allocations of public land had contributed to an increase of informal settlements.[124] The Commission recommended that the government should initiate programmes to address the problem of informal settlements by utilising recovered public land to establish decent and affordable housing schemes.[125] The recommendation relating to the right to housing within informal settlements can help mitigate forced evictions.

Notwithstanding the recommendations by the two commissions, Kenya has no clear guidelines that address the problem of forced evictions and realisation of land rights for people whose tenure to land is insecure. This study seeks to provide a thorough understanding of the current legal framework and contribute to the development and designing of a framework that provides solutions to mitigate forced evictions by proposing appropriate reforms.

1.4 Statement of the Research Problem

The purpose of this research is to contribute towards the development of a legal and policy framework that will curb forced evictions, or ensure that where such evictions are inevitable, they are conducted according to the applicable human rights norms. International law prohibits State laws from embarking on arbitrary evictions. Domestic and international obligations bind Kenya to desist from forced evictions. The CESCR, the treaty body that monitors State compliance with ICESCR has further observed that all persons should possess a degree of security of tenure, which offers a guarantee against forced eviction.[126]

The obligations to protect against forced evictions and other related rights such as the right to housing are contained in several international legal instruments. These include the UDHR, the ICESCR and thematic instruments such as Convention on the Elimination of all Forms of Discrimination against Women[127] and the Convention on the Rights of Persons with

[122] Ibid.
[123] Ibid 189.
[124] Ibid 191.
[125] Ibid; R Southhall 'The Ndung'u Report: Land & Graft in Kenya (2005) 103 *Review of African Political Economy* 146-151.
[126] UN CESCR 'General Comment No.4: The Right to adequate Housing' (1991) UN Doc E/1992/12 Para 8.
[127] Convention on the Elimination of all Forms of Discrimination against Women (1979) UN Doc A/34/46.

Disabilities.[128] The obligations are also contained in soft law standards instruments relating to forced evictions and the right to housing which include the UN Declaration on the 'Rights of Indigenous Peoples',[129] the UN Basic Principles on Development Based Evictions and Displacements[130] and the UN Principles on Housing and Property Restitution for Refugees and Displaced Persons.[131] The instruments contain good practices that can guide States, and even though they are not legally binding, they remain very persuasive in providing content to the international, regional and domestic norms binding on states.

Despite having adequate guarantees in international instruments on protection against forced evictions, the challenge has been to incorporate the international guarantees in national legislation and practice.[132] Kenya, like many other countries lacks policies and laws to adequately address the scourge of forced evictions. Since one of the key foundations of the Policy is to resolve genuine historical and current land injustices,[133] it is imperative that law and policy play a major role in protection against forced evictions. The land problem began at the onset of colonial rule and was perpetuated by laws and policies that have existed since then. Ineffective land laws have indeed contributed to the escalation of the problem of forced eviction rather than mitigating it.

1.5 Research Questions and Hypotheses

This thesis analyses land rights in Kenya and the role played by the law in protection against forced evictions. To tackle the problem, the study hypothesises that land title holding is largely indefeasible and absolute because the legal framework favours and protects formal title holders.[134] Additionally, there have not been efficient laws and an accountable institutional framework for land ownership and management that can protect individuals and communities from forced evictions. In order to facilitate a comprehensive approach in investigating this problem, the research seeks to answer the following main question:

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[128] International Convention on the Protection and Promotion of the Rights of Persons with Disabilities (2006) UN Doc A/61/49.

[129] UNGA 'United Nations Declaration on the Rights of Indigenous Peoples' (2011) UN Doc A/RES/66/142.

[130] Basic Principles and Guidelines on Development based Evictions and Displacement (note 20 above).

[131] UNHCHR, 'Principles on Housing and Property Restitution for Refugees and Displaced Persons' (28 June 2005) UN Doc E/CN.4/Sub.2/2005/17.

[132] M Langford & JD Plessis *Dignity in the Rubble? Forced Evictions and Human Rights Law* (2006) <http/www.jus.uio.no/ior/English/people.aca> accessed 23 March 2018 [2].

[133] The National Land Policy (note 41 above) 10-11.

[134] The land laws were enacted to protect the first registration of land and especially the provision that enjoyment of absolute and indefeasible title was not hampered by mistake or fraud. An example is Section 27 of the RLA Cap 300 Laws of Kenya (now repealed).

1. What are the limitations of the legal and institutional framework in addressing the problem of forced evictions in Kenya?

The following sub-questions will assist in answering the main question:

1. What are the legal and policy measures that are necessary to mitigate the problem of forced evictions?
2. What can Kenya learn from a comparable jurisdiction in addressing the problem of forced evictions?

1.6 Aims and Objectives of the Study

This research is premised on the notion that the law should at the very least address the problem of land rights and forced evictions in Kenya. The study intends:

1. To evaluate the Kenyan law in relation to land tenure and the problem of forced evictions.

2. To analyse the Kenyan constitutional and legislative framework and the attempts that the Kenyan Government has made to protect individuals and communities against forced evictions.

3. To analyse the inadequacies of the Kenyan legal framework and proffer suggestions for reform in the law and the legislative framework for Kenya in dealing with the problem of forced evictions.

4. To evaluate the human rights issues and practices provided in international law in respect of land rights and forced evictions and their relevance for addressing forced evictions in Kenya.

5. To study the related laws in a comparable jurisdiction, jurisprudence and judicial developments with a view to recommending the incorporation of best practices on land rights and mitigation of forced evictions into the Kenyan legal system.

1.7 Literature Review

There exists significant literature on the subject of land rights and forced evictions. This thesis does not pretend to pioneer research on the same. There are numerous studies that seek to evaluate the land question in Kenya.[135] However, there are few studies that have evaluated

[135] C Juma & JB Ojwang (eds) *In Land We Trust: Environment. Private Property and Constitutional Change* (1996); PK Mbote, C Odote, C Musembi & M Kamande *Ours by Right. Law, Politics and Realities of*

the question of land rights in relation to forced evictions and even fewer that seek to address the role of law in protecting persons without formal title to land. This study reviews the literature under the themes of imposition of English law, rights related to land and best practices in dealing with forced evictions.

1.7.1 Imposition of English Law in Kenya

Imposition of English law as a consequence of colonialism had implications on land holding and tenure systems. It is imperative to begin by establishing the concept of private property and how it came into being. The colonisation process had adverse effects on the interaction of the native people and their natural resources which include land. The effects of the establishment of colonial rule affected both population and production.[136] The population was affected by concentration of native people into reserves and production was affected by massive exploitation of resources that were found in the land.[137]

Land tenure before the advent of colonialism was communal in nature. The traditional practice was that different ethnic communities' exercised ownership to land collectively implying that land portfolio could be described as 'communitarian property.'[138] Legal instruments were used to give effect to the land rights of settlers.[139] Land alienation was also carried out through political processes that were given binding force of law through legal instruments. This is the origin of the instrumentalist tradition in property law.[140] Okoth-Ogendo observes that the Crown asserted that Europeans and not the local people had the original title to land within the Kenyan territory. The Crown, upon declaration of original title to the territory, was not only to resolve the issue of acquisition of land for public purposes but also transformed the tenure aspect as a key strategy for exploiting the country's resources.[141]

Community Property in Kenya (2013); P Onalo *Land Law and Conveyancing in Kenya* (1986); JB Ojwang *The Common Law, Judges Law: Land and Environment Before the Kenyan Courts* (2014); Okoth-Ogendo (note 6 above); Kariuki et al (note 16 above); Mbote (note 33 above); Mbote (note 51 above); Okoth-Ogendo (note 36 above); Kanogo (note 85 above); Ojienda (note 102 above) among others.

[136] Mbote (note 51 above) 59.

[137] Ibid. See also Kanogo (note 85 above) 1. Kanogo alludes to the fact that colonial rule led to alienation of African lands for European settlements and development of settler plantations that led to a demand for labor. Attempts were made to coerce Africans to seek work through imposition of taxes, creating reserves and disrupting local economies.

[138] Ojwang (note 135 above) 1.

[139] In order to facilitate the alienation of land, some legislation such as the Indian Land Acquisition Act and the Crown Lands Acts of 1902 and 1915 were enacted.

[140] Mbote (note 51 above) 56.

[141] Okoth-Ogendo (note 6 above) 12.

The Crown expropriated land through legal actions and applied English law as the basis for civil administration.[142] The Crown, as the new administration ignored the already established community principles and indigenous communities were forcefully relocated to reserves which comprised the least productive lands.[143] The areas where the Kenyan communities settled, commonly known as 'reserves' served as avenues for sourcing of cheap labour for European farms.[144] Migration of the communities from the reserves to the European farms commonly referred to as 'the white highlands' created the squatters/informal settlers on European farms and later escalated to rural-urban migration.[145]

The alien land tenure system introduced by the Crown had implications on the traditional land tenure systems. Customary law in general and specifically relating to landholding and property relations was made inferior to the formal private property rights that were based on English property law.[146] Indeed, the aim was to completely transform the African communal land tenure system to purely individualised holding of land.[147] The laws and policies adopted were aimed towards that goal. The RLA[148]was one of the pieces of legislation enacted to ensure the smooth transition from a communal to an individualised tenure system of landholding.

The exclusive private rights to land introduced by the Crown continued after independence in Kenya whilst other African countries adopted an overall state ownership approach to land.[149] The argument advanced for this was to ensure security of tenure by ensuring large scale privatisation and title registration programmes in order to increase investment in agriculture.[150] The impact of the individualised system of land tenure was monopoly of productive agricultural lands by a few owners at the expense of other agriculturalists and pastoralists. The benefits expected such as security of tenure, reduced land conflicts,

[142] JA Ainsley 'Land Tenure Ethics and Land Value Taxation in EW Gachenga *et al* (eds) *Governance, Institutions and the Human Condition* (2009) 271; Okoth-Ogendo (note 6 above) 5.
[143] Ibid.
[144] M Kangu *Constitutional Law of Kenya on Devolution* (2015) 66-67.
[145] Ibid 67.
[146] Mbote et al (note 135 above) 1-5.
[147] Okoth-Ogendo (note 36 above) 22.
[148] The RLA (note 101 above).
[149] AF Juma 'Governance and Sustainable Development' in C Juma & J.B Ojwang (eds) *In Land We Trust: Environment, Private Property and Constitutional Change* (1996) 21.
[150] Ibid.

economic size of land holding, an effective land market and sound natural resources management were not realised.[151]

The Judicature Act provides that customary law in civil matters shall guide all the courts to the extent that it is applicable and not repugnant to justice and morality or inconsistent with any written law.[152] The Crown considered customary law as a stage of evolution of African law. Okoth-Ogendo has explained this notion and states that:

> …it was expected, therefore, that relations defined by customary law, including common property systems, would wither away as western civilisation became progressively dominant in African social relations. There was, therefore, no need to acknowledge, let alone develop, customary law as a viable legal system and customary land tenure as a system of rights and duties.[153]

Introduction of formal policies, institutions and laws relating to land tenure marked the beginning of the problem of forced evictions. The Crown replaced indigenous land administration systems by a new regime comprising new structures for land rights in areas that were still under indigenous occupation.[154] The new structures facilitated eviction of communities from their lands, a problem that persists to date. The theme on imposition of English law in Kenya bridges the gaps left by writers in the context of the role of colonial law and policy in the problem of forced evictions in Kenya.

1.7.2 Rights Related to Land

Forced evictions affect other human rights. Human rights are interrelated and interdependent. Violation of one right has a direct or indirect consequence on other rights. Forced evictions affect other rights such as the right to life, movement, health among others. The analysis of interdependence of all rights is discussed in Chapter 2 of this thesis.[155] Land rights, the rights to property and housing though distinct as interconnected. Interdependence of human rights has become an increasingly prominent concept in the international human rights discourse especially within the political organs of the UN.[156] Scott observes that permeability is a means of giving practical legal meaning to the doctrine of interdependence of human rights.

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[151] Ibid 22.

[152] Cap 8 Laws of Kenya Section 3(2).

[153] Okoth-Ogendo (note 36 above) 8. Okoth-Ogendo states that the provisions in the Judicature Act gave the courts powers to strike out any customary law rules that they did not like or to declare as custom, what was unknown in African culture.

[154] Ibid 6.

[155] Section 2.2.1 of Chapter 2.

[156] C Scott 'Interdependence and Permeability of Human Rights Norms: Towards a Partial Fusion of the International Covenants on Human Rights' (1989) 27(3) *Human Rights Norms* 771.

Scott further observes that treaties that protect one category of human rights can also protect norms of another treaty dealing with a different category of human rights.[157]

In addressing the problem of forced evictions in Kenya, it is imperative to adopt the rights based approach. The approach is a conceptual framework that is based on international human rights standards and is operationally directed to protection and promotion of all human rights.[158] This is the approach where practical application of rights is tested in a need based environment.[159] The approach is connected to the basic needs approach that entails that a society can only develop if the fundamental needs of a people are met and this entails adherence to the human rights standards set out in international and regional conventions.[160] Domestic human rights standards are also applicable in that respect.

The right to housing is an important component for protection against arbitrary evictions.[161] The right has a close and intimate link to freedom from forced evictions. The right can be negatively enforced against improper invasion in the form of arbitrary evictions.[162] Bernard observes that Kenya has a long history of disregarding the right to housing despite ratification of various international instruments that recognised the right even before promulgation of the Constitution in 2010.[163] Kenya has not actualised the right to housing, which is a bulwark in protection from arbitrary evictions, even after it was included in the Bill of Rights.[164] Bernard further argues that security of tenure need not be legal security of tenure but the State can design policies to recognise de-facto security of tenure in the absence of formal title.[165]

States use the issue of public or national interest to justify forced evictions. When a State exercises the right to take over property in public interest, then it must do so in conformity

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[157] Ibid.

[158] United Nations International Children Emergency Fund (UNICEF) *Introduction to the Human Rights Based Approach: A Guide for the Finnish NGOs and their Partners* (2015) < www.hrbaportal.org> accessed 24 April 2018. [8]- [10]. The right based approach is twofold. The rights holders are empowered to claim and exercise their rights and strengthen the capacity of actors who bear the obligation to protect the rights of the vulnerable people.

[159] L Juma 'Nothing but a Mass of Debris: Urban Evictions and the Right of Access to Adequate Housing in Kenya' (2012) 12 (2) *African Human Rights Law Journal* 483-486.

[160] Ibid.

[161] CJ Mashamba *Litigating Human Rights in African Institutions: Law, Procedure and Practice* (2017) 137.

[162] I Currie & JD Waal *The Bill of Rights Handbook* (2018) 586.

[163] OM Bernard ' The Right to Housing in Kenya: From Law to Practice' (2015) 11(2) *Law Society of Kenya Journal* 19-32.

[164] Ibid 30.

[165] Ibid 23; UN Habitat *Enhancing Security of Tenure: Policy Directions* (2007) <www.unhabitat.org.grhs/2007> accessed 8 March 2018 [18]. The UN-Habitat has stated that even though titling to land, guaranteed by the State, is a legal form that the registration of tenure rights can take, the process is expensive.

with the rights of the people affected. In respect to indigenous people, the State must obtain free and informed consent from the community, provide for alternative settlement and pay for compensation for economic losses.[166] Though Kenyan law provides that the State shall not deprive anyone of any property of any description,[167] cases of forced evictions are still prevalent especially where people do not hold formal titles to land. Whether the victims have formal legal title or not, forced evictions are always seen as human rights violations under international law.[168]

1.7.3 Best Practices in Dealing with Forced Evictions

States are legally responsible for forced evictions that occur within their territories regardless of the cause of such evictions.[169] There are a number of writers who have addressed the issue of best practices in respect of protection from forced evictions. Dube,[170] addresses the issue of application of international law norms with regard to forced evictions. He uses illustrations from Ghana, South Africa, Zimbabwe, Swaziland and Botswana to demonstrate how forced evictions have implications on SERs and political rights. Kitiwa[171] examines the interests of the persons who are likely to be forcefully evicted, the rights of the other members of the public and national interests. In that regard, he stated that the competing interests have to be balanced.

Adams et al[172] addresses the issue of land rights and necessary reforms that also foreclose arbitrary evictions and landlessness. In order to secure land rights, land tenure reforms are necessary as well as right-holders investing in the land and using it sustainably. Adams et al referenced tenure reform in South Africa which is a component of a broader national land

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[166] Polsinelli (note 48 above) 151.

[167] Article 40(3) of the Constitution provides that 'the State shall not deprive a person of property of any description, or of any interest in or right over property of any description.'

[168] Polsinelli (note 48 above) 153.

[169] The jurisprudence of the African Commission on Human and Peoples' Rights Communication (ACHPR) is of importance. In *the Social and Economic Rights Action Centre for Social Rights (SERAC) v Nigeria*, ACHPR Communication 155/96, the ACHPR found the government of Nigeria culpable of violations of rights of the Ogoni people. Paragraph 63 particularly found the Nigerian government culpable of forced eviction of the community from its territory by security agencies. The decision suggested that even if the state had the right to deprive the indigenous Ogoni people of their land for the greater good, then the power had to be exercised in a manner that respects the human rights of the people in question.

[170] BA Dube 'Domestic Application of International Human Rights Norms in Forced Eviction Cases in International Commission of Jurists Kenyan Section *Africa Human Rights Litigation and the Domestication of Human Rights Standards in Sub Saharan Africa* (2007) 102-137.

[171] GN Kitiwa 'Human Rights and Forced Evictions in Kenya: Balancing Competing Interests' (2014) 10(1) *Law Society of Kenya Journal* 95.

[172] M Adams, S Sibanda & S Turner 'Land Tenure Reform and Rural Livelihood in Southern Africa in C Toulmin & J Quan (eds) *Evolving Land Rights, Policy and Tenure in Africa* (2000) 135-136.

reform programme.[173] The programme entails restitution and redistribution of land taken through discriminatory laws and policies before and during the apartheid period.

Odongo[174] and Juma[175] addresses the right to housing in Kenya as a component of protection from arbitrary evictions in the urban setting. Their works delve into the current constitutional dispensation regarding the right to housing in the Bill of Rights. They allude to the fact that the right has been recognised after many years of neglect and an opportunity has been created for safeguarding the rights of victims of forced evictions. Ojwang observes that if Kenya implements the Constitution fully, the country will be ahead of most African countries in terms of good governance and promotion of human rights. [176] However, the judiciary, legislature and executive have to seize these opportunities if protection from forced evictions is to be realised. These studies are useful in understanding the relationship between forced evictions, housing related rights and tenure security.

In South Africa, the right is more developed since Section 26 of the Constitution is one of the most litigated provisions among the SERs.[177] The recognition of housing rights under Section 26 has provided a firm foundation that transformed eviction laws in South Africa.[178] Evictions jurisprudence in the South African context were developed to ensure that evictions can only be carried out with a court order and courts consider the relevant circumstances before issuing eviction orders.[179] South Africa also developed legislation and jurisprudence that protect traditional communities from evictions.[180]

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[173] Ibid.

[174] Bernard (note 163 above) 19-54.

[175] Juma (note 159 above) 470-507.

[176] JB Ojwang *Ascendant Judiciary in East Africa: Reconfiguring the Balance of Power in a Democratizing Constitutional Order* (2013) 35-36.

[177] Socio-Economic Rights Institute of South Africa (SERI) *Evictions and Alternative Accommodation in South Africa: An Analysis of the Jurisprudence and Implications for Local Government* (2013). The Constitutional Court of South Africa set out the parameters for reasonable housing policy for protection from arbitrary evictions in *Republic of South Africa & Others v Grootboom & Others* (2001) (1) SA 46 (CC). The Court stated that the right to housing pertains to land, services and financing and not mere bricks and mortar. In Article 35, the Court stated that the State must create the conditions that ensure the right to housing for people at all economic levels. In the case of *City of Johannesburg Metropolitan Municipality v Blue Moonlight Properties 39 (Pty) Ltd and Another* (2011) ZASCA 47 the SCA stated that it would not issue eviction orders however justified if the orders will create homelessness.

[178] S Liebenberg *Socio-Economic Rights Adjudication under a Transformative Constitution* (2010). Chapter 6 gives an insight of eviction law in South Africa in the light of the provisions of Article 26 of the Constitution.

[179] Currie & De Waal (note 162 above) 586-588. According to the authors, Section 26(3) of the South African Constitution entrenches a negative right against arbitrary evictions and demolitions.

[180] W Wicomb 'South Africa Experience in Communal Land Rights Act' in C Odote & PK Mbote (eds) *Breaking the Mould, Lessons for Implementing Community Land Rights in Kenya* (2016) 107-128.

The wealth of jurisprudence in evictions from private land, informal settlements and evictions of rural communities are essential in informing reforms in Kenya. South Africa also adopted laws on tenure security, which may be a source of eliciting and harvesting best practices that can help reforming Kenyan law to safeguard the rights of the vulnerable from forced evictions. Drawing best practices and evaluation of constitutional and legislative norms that protect against arbitrary evictions in South Africa will benefit this study.

Das[181] observes that there are no legal systems that exclude indigenous peoples from enjoying their rights to land. However, Das notes that the existing legal protection is inadequate and indigenous Organisations in the world always demand special protection for land, land rights and resources.[182] He further stated that:

> … indigenous peoples are aware of the fact that unless they are able to retain control over land and natural resources, their survival as identifiable, distinct societies and cultures are seriously endangered, because their lands and resources are often taken over by outsiders and these people have been completely marginalised in their own ancestral homeland.[183]

Barume notes that post-colonial African societies enacted land laws on the premise that for the laws to protect traditional use and occupation of land of indigenous peoples, they had to lead a visible, permanent and sedentary lifestyle.[184] On the contrary, indigenous peoples lead a pastoralist lifestyle based on hunting, gathering, moving around large areas and cannot be tied to one fixed place.[185] Consequently, lands that indigenous peoples claim as ancestral lands are public land, protected areas, privately owned and occupied by other communities that do not self-identify as indigenous.[186]

There is an assumption that the lands occupied by indigenous peoples who are mainly hunter-gatherers and pastoralists, are empty and not productively utilised.[187] This has enhanced deprivation of such community's lands and in most cases, forceful evictions. In many cases, most national legislations recognise individual legal titles to land and fail to recognise collective tenure to land.[188] There are quite a number of international norms and conventions

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[181] JK Das *Human Rights and Indigenous Peoples* (2011) 58.
[182] Ibid.
[183] Ibid.
[184] Barume (note 3 above) 38.
[185] Ibid.
[186] Ibid.
[187] Report of the African Commission's Working Group on Indigenous Populations/ Communities (note 4 above) 42.
[188] Ibid.

protecting indigenous peoples but fail to protect other communities who are not members of an indigenous community whose security of tenure to land is also insecure.[189]

The Constitution provides that the general rules of international law and treaties ratified by Kenya form part of the law.[190] The provisions can be utilised to ensure that Kenya incorporates best practices in the fight against arbitrary evictions that are provided for under international law. The provisions provide courts with the opportunity to seek inspiration from the non-municipal legal framework when resolving disputes.[191] Kenya has ratified international and regional human rights instruments. The instruments to which Kenya is a state party impose legal obligations to promote the best practices on land rights and protection from forced evictions. The status of international law in the Kenyan Constitution will be discussed while addressing the international legal framework that protects against forced evictions in Chapter 3 of this thesis.[192]

IHRL can be used to support domestic litigation against forced evictions, to inform legislation and to inform the work of adjudicators. The adjudicators who preside over disputes relating to landlords and tenants may also be used in campaigns to curb arbitrary evictions and support the right to housing.[193] International human rights principles can also be used as a bulwark to protect against forced evictions.[194] However, the principles set out in international human rights norms have not adequately influenced national policies, laws and practices on protection against forced evictions.

Land rights and specifically protection from forced evictions are often denied though the norms have been established under international law and SERs being recognised in national constitutions.[195] The problem of forced evictions is a critical subject of international standard-

[189] DG Nunez 'Peasants Right to Land: Addressing the Existing Implementation and Normative Gaps in International Human Rights Law' (2014) 14 *Human Rights Law Review*) 603.

[190] Articles 2(5) & 2(6) of the Constitution; Lumumba & Franceschi (note 78 above) 72-74. The authors have opined that the issue of whether Kenya is monist or dualist is not yet clear despite enactment of the Treaty Making and Ratification Act 45 of 2012 and various decisions by the courts. In their opinion however, any ratified treaty forms part of the laws of Kenya under the Constitution and therefore does not need to be legislated by Parliament.

[191] M Oduor 'The Status of International Law in Kenya' (2014) 2(2) *Africa Nazarene University Law Journal* 97-125

[192] Section 3.2 of Chapter 3.

[193] UN Habitat *Forced Evictions Global Crisis, Global Solutions: A Review of the Status of Forced Evictions Globally through the work of the Advisory Group on Forced Evictions, UN Habitat and Other International Actors* (2011) < www.scribd.com.documents> accessed 12 March 2018 [32].

[194] Ibid.

[195] UN Habitat 2007 (note 165 above) 20-21.

setting initiatives with the increasing number of evictions, planned and carried out by State and non-state agents.[196] This study evaluates the human rights issues and practices as provided in IHRL and how the norms have been interpreted by the Kenyan courts. The study also evaluates the extent to which the norms have been domesticated by the legislature and the executive through adoption of appropriate policies and legislation.

1.8 Research Methodology

In order to address the research questions and the hypotheses, this thesis is based on desk top research. It reviews the relevant legal framework in Kenya including primary documents such as the Constitution, policy documents, statutes and case law. Primary documents also include treaties, declarations, resolutions and reports from national and international institutions. The thesis benefits greatly from General Comments and Concluding Observations made by treaty bodies. The thesis adopts a descriptive and analytical analysis of legal instruments and case law to demonstrate how the instruments have addressed the problem of forced evictions and how courts have grappled with the problem.

The study analyses and evaluates secondary literature including academic literature such as books, chapters in books, journal articles and online academic resources. The methodology will also include an analytical overview of the literature that will help in the development and refinement of the problem statement. The secondary sources used are instrumental because they provide insights into the conceptual, historical and legal issues on the subject of forced evictions. Research from both primary and secondary literature helped analyse the strengths and weaknesses of the current legal and institutional framework and the study thus makes proposals for reform.

The thesis also benefits from international and regional norms and jurisprudence on land rights and forced evictions. The UN and regional institutions developed norms and jurisprudence on evictions which can assist the Kenyan institutions to address the problem. The thesis adopts both descriptive and analytical review of international, thematic and regional human rights instruments as well as jurisprudence by regional courts. This demonstrates that interpretation given by the CESCR at the UN level and regional monitoring bodies on forced evictions are applicable in the Kenyan context. The discussion in Chapter 6 will enable building on the best practices in South Africa, as selected by this study. The

[196] Ibid.

methodology reviews legislation and case law by description and analysis that helps elicit and harvest best practices that can be applicable in the Kenyan context to help address the problem of forced evictions.

1.9 Focus and Scope of the Study

The focus of the thesis is experiences in Kenya. The scope is on land rights in Kenya and the role of law in protection against forced evictions. The thesis focuses on evictions within informal settlements, among indigenous peoples and other Kenyan communities. The Kenyan legal framework is measured against international norms and practices in the area of land rights and forced evictions.

The study recognises that there is an existing challenge of forced evictions in Kenya. The main focus will be to examine the role of law in protection against forced evictions. The research starts from the assumption that the policy, legislative and institutional framework fails to adequately protect against forced evictions. In order to address this problem, the author perceives reform to the law through adoption and infusion of international norms into domestic normative framework. Based on that and drawing from best practices in South Africa, a jurisdiction that has addressed the problem of forced evictions in Africa, the study highlights limitations and deficiencies in the legal framework and provides options for reforms. This thesis thus constitutes an original contribution to existing knowledge.

1.10 Outline of the Chapters

Chapter 1 introduces the study, provides the nature of land rights under Kenyan law and evolution of land law and policy in Kenya. The chapter provides the statement of the research problem, sets out the research questions and the hypotheses, aim and objectives of the study. The chapter further reviews the available literature on forced evictions and outlines the gaps to be filled by the study. The chapter also outlines the methodology, the focus and scope of the study.

Chapter 2 addresses the prevalence of forced evictions in Kenya. The chapter defines forced evictions and provides the theoretical framework for protection against forced evictions under the themes of interdependence of human rights and the impact of forced evictions on human dignity. The chapter evaluates forced evictions within the Kenyan context and discusses land

and title holding in Kenya, the statistics of title holding, the aspect of land tenure and classification of land rights.

Chapter 3 discusses the status of international law under the Kenyan Constitution. The chapter discusses the ICESCR and provisions of the General Comments by the CESCR on right to housing and protection from forced evictions. The instruments are important since they protect a series of rights that ensure adequate dignified existence of people.[197] The instruments have the potential to inform legislation and jurisprudence that can enhance protection against forced evictions.

The chapter also evaluates the contribution made by regional bodies and instruments in Africa in protection against forced evictions and the right to housing and further evaluates the indigenous peoples' jurisprudence made by the regional bodies. The chapter further discusses thematic human rights instruments and how they offer protection from forced evictions. The chapter demonstrates that the right to housing and the protection from forced evictions have been provided in international law. The chapter recognises that international, thematic and regional legal instruments have principles worth incorporating into the Kenyan legal framework to protect against forced evictions. The principles are essential in informing the role of law and policy on protection against forced evictions and assisting Kenyan courts in developing jurisprudence that aid in protection against arbitrary evictions.

Chapter 4 discusses and analyses the legal framework in Kenya on land rights and forced evictions. The discussion and analysis is done in a historical context, from the pre-colonial, colonial and post-colonial periods. The chapter discusses how the Crown used legislation to alienate and evict Kenyan communities from their land. The chapter discusses the Kenyan legal framework. It begins with a discussion on land rights under the Constitution. The chapter also evaluates the rights to housing and property as utilities to inform the effectiveness of the norms in protecting individuals and communities from evictions. The chapter further explores the role of the Kenyan national policy framework in respect of forced evictions and the effectiveness of the legislative framework in protection against forced evictions in Kenya.

Chapter 5 evaluates the institutional framework that has been employed in Kenya to enhance land rights and how effective they have been in addressing the problem of forced evictions.

[197] H Demsetz 'Towards a Theory of Property Rights' (2008) 57 (2) *The American Economic Association* 347-348.

The chapter evaluates and investigates the role of institutions created by the Constitution and legislation in protection against forced evictions. At the national level of governance, the chapter also explores the role of the judiciary, legislature and executive in protection against forced evictions. In evaluating the role of the judiciary, the chapter discusses the remedies available in unlawful eviction cases in Kenya. At the county level, the chapter evaluates the role of county governments in protection against forced evictions. The chapter further discusses the role of quasi-government institutions and constitutional commissions.

Chapter 6 explores protection from forced evictions in South Africa as a jurisdiction that Kenya can draw best practice from. The chapter evaluates the current constitutional and legislative framework for protection against forced evictions in South Africa. The chapter analyses norms, jurisprudence and judicial trends by the courts in protection of individuals and traditional communities from evictions. The chapter discusses recent developments such as joinder of municipalities in eviction proceedings, meaningful engagement and provision of alternative accommodation with a view to extrapolating best standards that may inspire the Kenyan executive, legislature and courts to put appropriate and adequate measures that protect individuals and communities from forced evictions.

Chapter 7 provides the findings of the study, gives conclusions and recommendations suggesting ways in which law and policy could be improved to address the problem of forced evictions. The chapter also articulates the original contribution of the study to scholarship and the policy and legal implications for Kenya. The chapter further outlines the areas for further research.

CHAPTER 2:
PREVALENCE OF FORCED EVICTIONS IN KENYA

2.1 Introduction

The United Nations (UN) Committee on Economic, Social and Cultural Rights (the CESCR) defines forced evictions as 'the permanent or temporary removal of people from their lands and homes against their will directly or indirectly and attributable to the state or non-state agencies without the provision or access to adequate legal remedies.'[1] The main perpetrators of forced evictions are both State and non-state actors. They include the central and county governments, private developers, private organisations, public institutions, individuals, state corporations and foreign business interests.[2]

Forced evictions are also defined as 'the permanent or temporary removal against the will of individuals, families and/or communities from the land or homes which they occupy.'[3] However, the CESCR observes that prohibition on forced evictions does not apply to evictions carried out in accordance with the law and in conformity with the provisions of the international human rights law (IHRL).[4] The assumption is that such evictions are carried out in accordance with human rights prescripts.

Forced evictions have a nexus with the right to housing. The negative obligation imposed by the right to housing entails protecting rights holders from the interference such as arbitrary evictions.[5] UN Habitat observes that Kenya still lacks substantive national legislation on the right to adequate housing and one that offers protection against arbitrary evictions.[6] Forced evictions in Kenya have been and continue to be a scourge against individuals and communities and continue unabated.

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[1] UN CESCR 'General Comment No 7, Forced Evictions and the Right to Adequate Housing' (1997) UN Doc E/1998/22 Art 11.1. The Committee on Economic, Social and Cultural Rights (CESCR) is a UN body composed of independent experts who monitor the implementation of social economic and cultural rights by member states to the ICESCR. The Committee was established under the Economic and Social Council Resolution 1985/17 of 28th May 1985. < www.ohchr.org> last accessed 16 January 2020.

[2] F Kariuki, S Ouma & R Ngetich *Property Law* (2016) 418.

[3] General Comment No 7 (note 1 above) Para 4.

[4] Ibid.

[5] I Currie & JD Waal *The Bill of Rights Handbook* (2018) 586.

[6] UN Habitat *Alternative Solutions To Forced Evictions And Slum Demolitions: Case Studies From Africa, Asia, North And South America* (2018) 41.

Amnesty International (AI) posits that forced evictions are prevalent in Kenya and spans from the colonial era to present day across cities and in the villages.[7] AI emphasises that having ratified the International Covenant on Economic, Social and Cultural Rights (ICESCR), Kenya bears the obligation to respect, protect and fulfil socio-economic rights (SERs) and particularly the right to adequate housing.[8] AI further observes that the government should implement measures that ensure sufficient tenure to protect people from arbitrary evictions.[9]

This chapter demonstrates the prevalence of forced evictions in Kenya. The chapter is divided into three parts. Section 2.1 introduces the chapter and defines forced evictions. Section 2.2 provides the theoretical framework under the themes of interdependence of all rights and the impact of forced evictions on human dignity. Section 2.3 evaluates forced evictions in the Kenyan context. This particular section discusses land and title holding, the aspect of land tenure and classification of land.

Section 2.4 evaluates forced evictions in informal settlements. The section discusses the prevalence of forced evictions within informal settlements. The section further analyses the current jurisprudence that demonstrates the prevalence and ramifications of forced evictions within informal settlements. Section 2.5 evaluates forced evictions of indigenous peoples. The section discusses the definitions of indigenous peoples, prevalence of forced evictions on indigenous peoples and case studies of forced evictions of the *Ogiek* and *Endorois* indigenous peoples. The section also analyses the Kenyan and regional jurisprudence developed in respect of the two communities.

Section 2.6 evaluates forced evictions of other Kenyan communities with specific reference to communities living on the Kenyan coast. The section discusses the prevalence of the evictions and jurisprudence relating to other communities that are not indigenous. Sections 2.4, 2.5 and 2.6 demonstrate how the different categories of persons who are non-holders of formal titles to land are vulnerable to forced evictions in Kenya. Section 2.7 gives the concluding remarks and the key findings of the chapter.

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[7] Amnesty International *The Unseen Majority: Nairobi's Two Million Slum Dwellers* (2009) <www.amnesty.org> accessed 26 November 2019 [6] & [13].

[8] Ibid 12. The ICESCR as a principal human rights treaty was adopted in 1966 and came into force in 1976. See the General Assembly Resolution 2200A (XXI) of 16 December 1966. UN Doc A/6316 (1966) 993 U.N.T.S.

[9] Ibid.

The following section discusses the theoretical framework of the study within the themes of interdependence of all rights, the impact of forced evictions on human dignity and the justifications of forced evictions.

2.2. Theoretical Framework

The study adopts the rights based approach in resolution of forced evictions. The study will utilise the rights to property and housing to evaluate the effectiveness of the norms in protection against forced evictions in Kenya. Demsetz argues that property rights help people form expectations that they can reasonably hold in dealing with others. He advanced the essence of property rights by stating that:

> … property rights are an instrument of society and derive their significance from the fact that they help a man from those expectations which he can reasonably hold in his dealings with others. These expectations find expression in the laws, customs, and mores of a society. An owner of property rights possesses the consent of fellowmen to allow him to act in particular ways. An owner expects the community to prevent others from interfering with his actions, provided that these actions are not prohibited in the specifications of his rights.[10]

Kieyah and Mbote argued that land title registration is one of the most important institutions for securing land rights though it has not succeeded in many parts of the world.[11] This study seeks to bridge the gaps left by writers in the context of land rights and protection from forced evictions for individuals and communities whose land tenure is insecure.

2.2.1. Interdependence of All Rights

Interdependence of all rights has a nexus with protection against forced evictions. It forms the theoretical basis for supporting the protection against forced evictions and the right to housing as a bulwark against arbitrary evictions. IHRL has demonstrated this fact. The UN has declared human rights as interrelated, interdependent, indivisible and equal.[12] The rights include categories of human rights that have been recognised in human rights treaties including the rights of women, children, vulnerable populations such as indigenous peoples and the right to development.[13] Such rights depend to some degree on the implementation of

[10] H Demsetz 'Towards a Theory of Property Rights' (2008) 57 (2) *The American Economic Association* 347.
[11] J Kieyah and PK Mbote 'Securing Property Rights in Land in Kenya: Formal Versus Informal' in CS Adam et al (eds) *Kenya Policies for Prosperity* (2010) 311.
[12] DJ Whelan *Untangling the Indivisibility, Interdependency, and Interrelatedness of Human Rights* (2008) <http://www.econ.uconn.edu > accessed 10 October 2022 [2]. See also Kenyan Section of International Commission of Jurists *Parliamentary Human Rights Handbook* (2006) 30.
[13] Ibid.

other human rights[14] Forced evictions result in other severe human rights violations, particularly when accompanied by forced relocation or homelessness.[15]

The UN Habitat states that if no adequate alternative housing is provided upon eviction, the right to food, education, health, employment and livelihood opportunities are denied to the victims of forced evictions.[16] The Universal Declaration of Human Rights (UDHR)[17] demonstrates that all rights are interdependent and interrelated by placing political, civil and SERs on the same level. The UN General Assembly (UNGA) in the Final Act of the International Conference on Human Rights 1968 recognised the interdependence of human rights.[18] The Final Act provided that enjoyment of civil and political rights and freedoms also require the realisation of SERs and that these human rights and fundamental freedoms are closely interconnected and interdependent.[19]

In 1985, UNGA also affirmed the interdependence of human rights.[20] UNGA recognised that all rights and fundamental freedoms are interdependent and promotion and protection of one right does not exempt States from promotion and protection of the other rights.[21] UNGA further appealed to all States to pursue policies directed towards the implementation, promotion and protection of economic, social, cultural, civil and political rights recognised in international human rights instruments.[22]

The tenet of interdependence of human rights in IHRL was emphasised by the Vienna Declaration and Programme of Action. The Declaration states that:

> …all human rights are universal, indivisible and interdependent and interrelated. The international community must treat human rights globally in a fair and equal manner, on the same footing, and with the same emphasis. While the significance of national and regional particularities and various historical, cultural and religious backgrounds must be borne in mind, it is the duty of States, regardless of their political, economic and cultural systems, to promote and protect all human rights and fundamental freedoms.[23]

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[14] Ibid.

[15] UN Habitat *Forced Evictions and Human Rights* (2014) <ohchr.org/documents/publications/FS25.Rev.1.pdf> accessed 21 May 2018 [1]-[2].

[16] Ibid.

[17] Universal Declaration of Human Rights (1948) UN Doc A/810.

[18] UNGA *The Final Act of the International Conference on Human Rights* (1968) UN Doc A/CoNF. 32/41.

[19] Ibid the Preamble.

[20] UNGA *Indivisibility and Interdependence of Economic, Social, Cultural, Civil and Political Rights* (1985) A/RES/41/117.

[21] Ibid the Preamble.

[22] Ibid Para 2.

[23] UNGA *Vienna Declaration and Programme of Action* (1993) 25 June 1993 UN Doc A/CoNF.157/24 Para 5.

The Declaration renewed and expanded the concept of interdependence of human rights by stating that democracy, development and respect for human rights and fundamental freedoms are interdependent and mutually reinforcing.[24] In that regard, the Declaration called on the international community to support democracy, development and respect for human rights and fundamental freedoms.[25]

Whelan observes that the interdependence of all rights describes the extent to which the enjoyment of a right or a cluster of rights that are related to one depends on the realisation of other rights or clusters of rights.[26] Liebenberg argues that adjudication of civil and political rights such as the right to life and equality should include a consideration of the interests underpinning SERs claims.[27] Liebenberg further argues that interpretation of SERs should reflect the values of freedom and dignity underpinning many civil and political rights.[28]

Protection from forced evictions is connected to other human rights. Forced evictions violate other rights recognised nationally and internationally.[29] Forced evictions directly translate to a denial of the right to adequate housing and denial to the realisation of other rights.[30] The CESCR recognises this fact by stating that owing to the interdependence of all human rights, forced evictions frequently violate other human rights.[31] The CESCR affirms that forced evictions have implications on the right to life, security of the person, non-interference with privacy, family and home and to the peaceful enjoyment of possessions.[32]

2.2.2 Impact of Forced Evictions on Human Dignity

The right to life, equality, human dignity and housing are protected by domestic constitutions, legislations and international human rights instruments.[33] However, vulnerable populations within the society continue to be victims of forced evictions, the international and domestic guarantees notwithstanding. The human costs of forced evictions are substantial and have

[24] Ibid Para 8.
[25] Ibid.
[26] Whelan (note 12 above) 10.
[27] S Liebenberg *Socio-Economic Rights Adjudication under a Transformative Constitution* (2010) 51-52.
[28] Ibid.
[29] SM Kimeu & BW Maina 'Forceful Evictions: An Intersection between Corruption, Land and Human Rights: Case Study of the Kenyan perspective' (2018) 1 *African Journal of Land Policy and Geospatial Sciences* 102.
[30] Ibid 102.
[31] General Comment No. 7 (note 1 above) Para 4.
[32] Ibid.
[33] MK Mbondenyi 'The Bill of Rights' in PLO Lumumba, MK Mbondenyi & SO Odero (eds) *The Constitution of Kenya: Contemporary Readings* (2011) 61-64. See also MK Mbondenyi & JO Ambani '*The New Constitutional Law of Kenya: Principles, Government & Human Rights* (2012) 158-160.

negative effects on the lives and livelihoods of the affected people.[34] Many people are left homeless, landless, without access to food and other basic amenities and sometimes loss of life.

Evictions are traumatic, cause psychological distress and increase impoverishment. The assets of the poor and vulnerable members of communities which include material assets and aspects of social capital created over the years are destroyed when the evictions are carried out.[35] Kimeu and Maina elaborated on the impact of forced evictions on human dignity and stated that:

> …as a result of forced evictions, people are often left homeless and destitute without means of earning a livelihood and in practice, with no effective access to legal redress or other remedies. Forced evictions intensify inequality, social conflict, segregation and invariably affect the poorest, socially and economically vulnerable and marginalised sectors of society, especially women, children, minorities and indigenous people. Forced evictions in the broader sense constitute gross violations of a range of internationally recognised human rights, including the human rights to adequate housing, food, water, health, education, work and security of the person, freedom from cruel, inhuman and degrading treatment.[36]

The CESCR interprets the right to housing, which is an important component for protection against arbitrary evictions to include the right to live in security, peace and dignity.[37] The CESCR opines that the right to housing should not be interpreted restrictively to equate it to either a mere roof over one's head or a mere commodity.[38] Forced evictions of occupiers from their homes have adverse effects on individuals, families and communities and violate their dignity.

The Constitution of Kenya (the Constitution) provides for the right to life, dignity, equality and housing.[39] However, many people living in urban and rural areas still continue to be victims of forced evictions, and their rights violated. Arbitrary evictions are often directed towards the poor segment of the society, especially the ones living in informal settlements,

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[34] C Polsinelli 'Right to Land-Right to House and Adequate Standard of Living' in International Commission of Jurists Kenyan Section *Human Rights Litigation and the Domestication of Human Rights Standards in Sub Saharan Africa* (2007) 152.

[35] GN Kitiwa 'Human Rights and Forced Evictions in Kenya: Balancing Competing Interests' (2014) 10(1) *Law Society of Kenya Journal* 105.

[36] Kimeu & Maina (note 29 above) 104.

[37] UN CESCR 'General Comment No.4: The Right to Adequate Housing' 13 December 1991 UN Doc E/1999/23 Para 7.

[38] Ibid.

[39] Republic of Kenya *The Constitution of Kenya* (2010). Chapter 4 provides for the Bill of Rights. Article 26 provides for the right to life, Article 27 provides for the right to equality and freedom from discrimination, Article 28 provides for the right to human dignity and Article 43 (1) (b) provides that 'every person has the right to accessible and adequate housing and to reasonable standards of sanitation.'

indigenous communities and other communities that are not regarded as indigenous. Kitiwa elaborates the effects of forced evictions by stating that:

> ...the effects of forced evictions are always catastrophic on the evictees in the sense that leaves them homeless and subject to deeper poverty, discrimination, separation of family members, loss of property and social exclusion. Such communities are invariably evicted against their will and in most cases, without any compensation or alternative housing.[40]

Forced evictions continue to affect defenceless societies at the hands of the dominant societies.[41] The evictions cause homelessness, physical and psychological effects on the people, loss of livelihoods, loss of cultural materials and tenure insecurity.[42] Forced evictions also affect the right to security of the person, privacy of individuals, family and home and also affect the right to property, rights which are related to human dignity.[43]

Forced evictions of indigenous peoples from their land and exploitation of resources found on the land undermine their dignity. Indigenous peoples are subjected to forced evictions for resource extraction, agribusiness, nature conservation initiatives and development projects, including pipeline and dam construction.[44] The evictions are often carried out through violence and harassment, without effective consultation and without free, prior and informed consent as well as without just and fair compensation.[45] Indigenous women and girls are often targets of sexual assault, exploitation, harassment and murder during evictions.[46]

Forced evictions threaten the indigenous people's right to life, the right to protection of the law and the right not to be discriminated against. The evictions further impoverishes indigenous peoples socially, economically and culturally undermines the indigenous people's efforts to alleviate poverty and limits their potential to achieve sustainable development.[47]

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[40] Kitiwa (note 35 above) 95.

[41] BA Dube 'Domestic Application of International Human Rights Norms in Forced Eviction Cases in Africa' in The Kenyan Section of the International Commission of Jurists *Human Rights Litigation and the Domestication of Human Rights Standards in Sub Saharan Africa* (2007) 1.

[42] KM Otiso 'Forced Evictions in Kenyan Cities' (2002) 23(3) *Singapore Journal of Tropical Geography* 261.

[43] General Comment No. 7 (note 1 above).

[44] UNGA 'Report of the Special Rapporteur on Adequate Housing as a Component of the Right to an Adequate Standard of Living, and on the Right to Non-discrimination in this Context' (2019) UN Doc A/74/183 [Para 31] ;F Kariuki 'Land Rights Issues in the Extractives Sector in Kenya' in JO Ambani *Drilling Past the Resource Curse? Essays on the Governance of Extractives in Kenya* (2018) 144-149.

[45] Ibid.

[46] UNGA 'Report of the Special Rapporteur on the Rights of Indigenous Peoples on Her Visit to Guatemala' (2018) UN Doc A/HRC/39/17/Add Paras 95-97.

[47] Report of the African Commission's Working Group on Indigenous Populations/ Communities *Extractive Industries, Land Rights and Indigenous Populations'/Communities' Rights, East, Central and Southern Africa* (2017) Adopted by the African Commission on Human and Peoples Rights at its 58th Ordinary Session 2016 [29].

2.3 Forced Evictions in the Kenyan Context

The CESCR observes that forced evictions are carried out in both developed and developing countries by stating that:

> …the practice of forced evictions is widespread and affects persons in both developed and developing countries. Owing to the interrelationship and interdependency which exist among all human rights, forced evictions frequently violate other human rights. Thus, while manifestly breaching the rights enshrined in the ICESCR, the practice of forced evictions may also result in violations of civil and political rights, such as the right to life, the right to security of the person, the right to non-interference with privacy, family and home and the right to the peaceful enjoyment of possessions.[48]

The foregoing demonstrates that forced evictions involve the violation of SERs, which are contrary to international human rights standards.[49]

The concept of urban development has caused an increase of forced evictions not only in Kenya but globally.[50] According to the UN Habitat, 56% of the world population live in urban areas and the population is expected to increase to 68% by 2050.[51] The UN Habitat observed that tenure insecurity in slums and informal settlements within urban areas has been used to justify forced evictions and displacements and has recommended urgent strengthening of tenure security in slums and informal settlements as one of the catalysts for equitable urban futures.[52] The increase in the population in informal settlements justifies forced evictions to pave way for urban planning and development.[53] The description by the UN Habitat fits the Kenyan situation regarding evictions.

The problem of land rights and forced evictions in Kenya can be traced from the colonial period to the successive regimes after independence in 1963.[54] The problem is intertwined with the land question in the country since the colonial period to the present day. The land question in Kenya has been intriguing, not only after independence but also during the

[48] General Comment No 7 (note 1 above) Para 4.
[49] Dube (note 41 above) 105.
[50] Ibid 67.
[51] UN Habitat *World Cities Report: Envisaging the Future of Cities* (2022) 4.
[52] Ibid 82.
[53] UN Habitat *World Cities Report: Urbanization and Development, Emerging Futures* (2016) 13, 22.
[54] J Lonsdale & B Berman 'Coping with the Contradictions: The Development of the Colonial State in Kenya, 1895-1914 20 *Journal of African History* (1979) 495-505; HWO Okoth-Ogendo *Tenants of the Crown: Evolution of Agrarian Law and Institutions in Kenya* (1991) 1-10; K Kanyinga, O Lumumba & KS Amanor 'The Struggle for Sustainable Land Management and Democratic Development in Kenya: A History of Greed and Grievances' in KS Amanor & S Moyo *Land & Sustainable Development in Africa* (2008) 100-123.

colonial times.[55] Wanjala observes that the declaration of a Protectorate by the British Crown (the Crown) in Kenya and later a colony altered the indigenous relations to land.[56]

The Crown put in place a legislative framework that justified the conquest and acquisition of land through displacement of the native communities.[57] By asserting original title to all land in Kenya, the Crown gave exclusive rights to the settler communities and user rights to native communities.[58] The Crown accumulated and expropriated land for settlement and agriculture and reserved the unproductive land for settlement by the communities.[59] The accumulation and appropriation of land by the Crown impacted landholding leading to forcible evictions of native communities from their lands, land shortage and crisis linked to access and control of land.[60] The detailed analysis on the land rights and forced evictions in Kenya within the context of pre-colonial, colonial and post-colonial will be discussed in Chapter 4 of this thesis.[61]

The recent jurisprudence on forced evictions has recognised that the country lacks a substantive legal framework that provides for substantive and procedural protection against forced evictions. The High Court in the case of *Satrose Ayuma & 11 others v. Registered Trustees of the Kenya Railways Staff Retirement Benefits Scheme & 3 Others*[62] determined the rights of the petitioners to adequate housing and sanitation. The case also determined the right to human dignity and protection against arbitrary evictions. The case concerned a parcel of land located within the County of Nairobi owned by the Kenya Railway Corporation (the Corporation) and consisting of residential houses and social amenities used by the Corporation's staff. The Kenya Railways Staff Retirement Benefits Scheme (the scheme) had established a trust to provide pension and other benefits to the employees as well as managing properties belonging to the scheme including the suit property.[63]

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[55] Republic of Kenya *Report of the Commission of Inquiry into the Illegal/Irregular Allocation of Land* (2004) 3.

[56] S Wanjala 'Recurrent Themes in Kenya's Land Reform Discourse since Independence' in S Wanjala (ed) *Essays in Land Law: The Reform Debate in Kenya* (2000) 171.

[57] T Ojienda 'Illegal and Irregular Title: Colloquial Overtones' 1(1) *Law Society of Kenya Journal* (2005) 13-29.

[58] D Kangethe *An Evaluation of the Effects of Land Tenure on Land Use in Kenya: Evidence of Bondo, Busia and Siaya Districts* (2012) 2.

[59] PK Mbote 'Righting Wrongs: Confronting Land Dispossessions in Post-Colonial Contexts' (2009) 1 *East African Law Review* 4.

[60] Kanyinga et al (note 54 above) 101-102.

[61] The discussion is found in Sections 4.2, 4.3 and 4.4 of Chapter 4.

[62] High Court of Kenya at Nairobi Petition No. 65 of 2010 and (2013) eKLR.

[63] Ibid Para 2.

The trustees who managed the properties belonging to the Corporation closed the account into which rent was paid, and subsequently the first respondent disconnected water supply and demolished the main fence in order to force the residents out of the premises.[64] The scheme published notices for eviction that required the residents to vacate the suit premises within a period of 90 days. Before the expiry of the notice period, demolitions began and the applicants sought redress in the High Court. Satrose Ayuma and the others claimed that the respondents violated fundamental rights and freedoms which included the right to accessible and adequate housing, the right not to be treated in a cruel and degrading manner as well as the right to live in dignity.[65]

The High Court addressed the issue of protection from forced evictions under international law and Kenyan law.[66] The High Court relied on South African jurisprudence[67] and found that there was a clear violation of the right to housing by the respondents as the evictions were carried out without due regard to the UN Guidelines on Forced Evictions at the very minimum. The High Court stated that:

> … Kenya, so far as I know, does not have a law governing evictions whether forced or otherwise. Consequently, I must look to international law and the jurisprudence emerging from other countries to discern the ideal situation with regard to the subject.[68]

The High Court ruled that the petitioners' right to adequate housing would have been violated by the manner in which the evictions were to be carried out.[69] The High Court observed that if the evictions were to be carried out without a proper plan and adequate notices, then the petitioners would be rendered homeless and vulnerable. The High Court elaborated the problem of forced evictions in Kenya by stating that:

> …there is widespread forced evictions that are occurring in the county coupled with a lack of adequate warning and compensation which are justified mainly by public demands for

[64] Ibid Paras 2 & 3.

[65] Ibid Para 5.

[66] The High Court relied on the provisions of international instruments which include the UDHR, the International Covenant on Economic, Social and Cultural Rights (ICESCR) and the two general comments, the International Covenant on Civil and Political Rights (ICCPR), the Convention of Elimination of all Forms of Racial Discrimination (CERD), the Convention of Elimination of all Forms of Discrimination Against Women (CEDAW), the Convention on the Rights of the Child and the regional treaty which is the African Charter on Peoples and Human Rights which the High Court recognised that Kenya is a signatory. The High Court also relied on Article 43 of the Constitution of Kenya which provides that every person has the right to accessible and adequate housing and to reasonable standards of sanitation.

[67] The decision by the South African Constitutional Court in the case of *Government of the Republic of South Africa v Grootboom & Others* (2001) (1) SA 46 (CC).

[68] Ibid Para 79.

[69] Ibid Para 89.

> infrastructural developments such as road bypasses, power lines, airport expansion and other demands, unfortunately there is an obvious lack of appropriate legislation to provide guidelines on these notorious evictions. The time is now ripe for the development of eviction laws.[70]

The High Court ruled that the petitioners made out a case for violation of the right to housing, sanitation, human dignity and rights for children since the evictions were to be carried out without a proper plan and time, a phenomenon that could have left people homeless and vulnerable.[71] Additionally, the High Court established that the petitioners were not involved in the decision making process since the notices did not detail the justification for the eviction and were not properly served to the petitioners.[72]

The High Court issued a structural interdict to the Attorney General, the third respondent to file an affidavit within 90 days after the judgement detailing out existing or planned State policies and legal framework on forced evictions and demolitions and if the policies or legal framework adhere to acceptable international standards.[73] The High Court also ordered the Attorney General to provide information regarding measures that the government had put in place towards the realisation of the right to accessible and adequate housing and to reasonable sanitation in accordance with the Constitution.[74]

The High Court granted injunctive orders to restrain the trustees from evicting the petitioners until the case was finally determined. Additionally, the High Court offered guidance that neutral observers should be present during evictions including a mandatory presence of governmental officials or county officials, adherence to human dignity, life and security of the evictees.[75] The High Court also guided that evictions should not be carried out at night, during unfavourable weather conditions and during times that could affect learning in schools.[76]

The *Satrose Ayuma* case demonstrates the prevalence of forced evictions in Kenya carried out without adequate notices and compensation to the victims. The case also demonstrates the gap in the legal framework which this thesis seeks to address. The case also demonstrates the need to address the problem of systemic forced evictions. The case is also essential because it

[70] Ibid para 108.
[71] Ibid Paras 89 & 107.
[72] Ibid Para 89.
[73] Ibid Para 111(b).
[74] Ibid Para 111(c).
[75] Ibid Para 111 (e).
[76] Ibid.

informs the need to develop clear policies and legal guidelines that adhere to international best practices on evictions.

The following section evaluates land and statistics of title holding in Kenya. The section demonstrates that a substantive segment of the population does not hold formal titles to land. The section also evaluates the concept of land tenure and discusses the classification of land under the Constitution.

2.3.1 Land and Title Holding in Kenya

Kenya has a surface area of 582 646 Km^2 of which 97.8 percent is covered by land and 2.2 per cent covered by water.[77] Public land comprises 77,792 Km^2, community land comprises 396 315 Km^2 and 107 953 Km^2 comprises land under private ownership.[78] The total population according to the last national census conducted in 2019 is 47 564 300.[79] The population growth rate is 3.4 percent per year.[80]

The capital city Nairobi has a population of 2 million people who live within informal settlements.[81] Informal settlements are characterised by lack of appropriate housing, insecure tenure, environmental degradation, inadequate access to basic services and proliferation of slums.[82] According to AI, the people in informal settlements are forced to live in inadequate housing and are in constant threat of forced evictions.[83]

According to data by the State Department of Lands and Physical Planning,[84] the number of title documents to land issued between the years 2013 and 2022 is 5 100 000 compared to 5 600 000 land titles issued since Kenya attained independence in 1963. The State department

[77] Republic of Kenya *Sessional Paper No 3 of 2009 on National Land Policy* (2009) 1 (hereinafter referred to as the National Land Policy). See also the Republic of Kenya *Sector Plans for Land Reforms 2013-2017* (2013) 1.
[78] Sector Plan for Land Reforms (note 77 above) 1.
[79] Republic of Kenya *2009 National Population and Housing Census* (2011) (hereinafter referred to as the 2019 Population Census Report). It is important to note that Kenya carries out her national census every ten years. The last census was done in 2019. The Statistics Act 4 of 2006 establishes the Kenya National Bureau of Statistics which is mandated to conduct a national population census after ten years.
[80] Ibid.
[81] Amnesty International Kenya *The Unseen Majority: Nairobi's Two Million Slum Dwellers* (2009) 1.
[82] Republic of Kenya *National Spatial Plan 2015-2045 Optimal Productivity, Sustainability, Efficiency and Equity in the use of Land and Territorial Space* (2016) 110.
[83] Amnesty International Kenya (note 81 above) 1-2.
[84] Republic of Kenya *Executive Order No. 1*: *Organisation of the Republic* of *Kenya* (2023) 32. The State Department of Lands and Physical Planning is under the Ministry of Lands, Public Works, Housing and Urban Development.

has issued approximately 10 100 000 titles since independence.[85] Compared to the current population, the statistics imply that many Kenyans do not have formal titles to the land they currently occupy. Even though land adjudication and registration of titles to land has been ongoing, the majority of Kenyans lack ownership documents to land they occupy.[86] The implication is that those who lack such titles and thus lack security of tenure are at risk of being evicted.

2.3.2 Land Tenure in Kenya

Land tenure entails the 'terms and conditions under which land is acquired, retained, used and disposed of or transferred.' [87] The concept considers the aspect of people, time and space and defines the persons who control the land and the resources found on it.[88] Land tenure exists when individuals have the right to land, free from interference from outside sources and with the ability to benefit from labour and capital invested on land.[89] Land tenure encompasses rights and obligations that a landholder has in respect of the land, the duration of time the landholder can exercise a right and certainty of rights and obligations over land.[90]

Before colonialism, the land tenure that existed was communal. Customary law governed property relations among African communities and land was communally held and radical title vested to the community with user rights granted to the families.[91] Land was managed at different levels of the social structure as a trans-generational asset to be used for purposes of cultivation, grazing, hunting, recreation, fishing and biodiversity conservation.[92]

Land tenure has transformed from the pre-colonial era, the imposition of English property laws by the Crown, to the present day.[93] The introduction of formal laws by the Crown created private tenure mainly governed by policies, laws and institutions established by the Crown. Du Plessis observes that the colonists assumed that the language and concept of

[85] The State Department for Lands and Physical Planning of the Republic of Kenya <https://lands.go.ke/case-studies/national-land-titling> accessed 16 June 2023.
[86] Sector Plan for Land Reforms (note 77 above) 1.
[87] The National Land Policy (note 77 above) 15.
[88] HWO Okoth-Ogendo 'The Tragic African Commons: A Century of Expropriation, Suppression and Subversion' in *Land Reforms and Agrarian Change in Southern Africa* (2002) 1-5.
[89] F Kariuki & R Ng'etich 'Land Grabbing, Tenure Security and Livelihoods in Kenya' (2016) 9 *African Journal of Legal Studies* 83-84.
[90] Ibid 84.
[91] Okoth-Ogendo (note 88 above) 6.
[92] T Jackson *The Law of Kenya* (1998) 249-251.
[93] PK Mbote, C Odote, C Musembi & M Kamande *Ours by Right: Law, Politics and Realities of Community Property* in Kenya (2013) 17-19.

property ownership was universally acceptable and applicable to civilised societies.[94] The colonists made the assumption that land must have owners, even where the rights had not been defined.[95]

The land administration by the Crown and post-colonial regimes undermined the traditional forms of land tenure and created uncertainty in access, exploitation and control of land and the resources found on land. Mbote et al emphasised this fact by stating that:

> …colonialism not only imposed alien tenure relations in Kenya, it also introduced conceptual, legal and sociological confusion in traditional tenure systems. As a result, African customary land tenure and laws suffered far reaching disruptions. Colonial policy makers assumed that customary land tenure systems were unsuited to modern agricultural development.[96]

Du Plessis notes that the natural development of traditional African indigenous tenure was stunted by the colonial ideological framework of private ownership, which was perpetuated by the post-colonial regimes.[97] The analysis on land rights during the pre-colonial, colonial and post-colonial periods and the contribution towards arbitrary evictions in Kenya will be discussed in Chapter 4 of this thesis.[98]

The guiding principles for the acquisition, use and disposal of land rights include equal recognition and enforcement of land rights, non-discrimination, protection of multiple values of land and development of incentives to encourage efficient utilisation of land.[99] This applies to all the forms of land tenure. However, within all the forms of tenure, there should be reasonable duration of rights appropriate for land use and secondly effective legal remedies against eviction or arbitrary curtailment of the land rights.[100]

The traditional system of property ownership was replaced by the concept of property entitlement, which is predicated upon individual persons or corporate entities.[101] That has resulted in the registered titles to land for individuals and entities and significant

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[94] WJ Du Plessis 'African Indigenous Land Rights in a Private Ownership Paradigm' (2011) 14 (7) *Potchefstroom Electronic Law Journal* 49.
[95] Ibid.
[96] Mbote et al (note 93 above) 17.
[97] Du Plessis (note 94 above) 58.
[98] Section 4.2 of Chapter 4.
[99] The National Land Policy (note 75 above) 19.
[100] K Muigua, D Wamukoya & F Kariuki *Natural Resources and Environmental Justice in Kenya* (2015) 133. The authors have also identified other important aspects of land tenure which include the user's right to bequeath land to heirs and lease the land on either long-term or short-term basis.
[101] JB Ojwang *The Common Law and Judges' Law: Land and Environment Before the Kenyan Courts* (2014) 44.

commercialisation of land ownership.[102] Through private land ownership, an individual or corporate entity is conferred unlimited rights of use and disposition whereas under leasehold tenure, the right to use is derived for a specific time from a superior title which provides for special conditions for use, which include payment of rent to the government.[103]

The renewal of such a lease is dependent on the conformation with the approved special conditions.[104] The private land tenure is also referred to as the exclusive land tenure where individuals were issued with title to land through official policy by the colonial government through the processes of adjudication, consolidation and registration.[105] The result of this is that most of the land that was held under customary tenure was converted to individual tenure or private tenure.

Kanyinga argues that granting property rights to ordinary Kenyans was intended to justify the rights that had already been granted to the Crown and the elite Kenyans.[106] Mbote concurs by observing that the land tenure reform which entailed a paradigm shift from customary tenure to individual tenure or private tenure, was not informed by the need for agricultural production or ecosystem sustainability.[107] Land tenure reform was informed by the need of the colonial authorities to entrench themselves firmly and maintain the rights to land without necessarily giving it back to the Kenyans.[108] Mbote emphasises this fact by stating that:

> …the introduction of tenure reforms in Kenya leading to individual rights to land was not informed by the needs of agricultural production or ecosystem sustainability. It was informed by a perceived need of the colonial authorities to entrench themselves firmly in Kenya and maintain the rights they had to land without having to give back any of them to the natives. The African landed gentry, a small and very powerful minority, proved invaluable and ensured that the property rights system introduced during colonialism continued operating even after power was passed on to the new government at independence.[109]

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[102] Ibid.

[103] Ibid 250.

[104] Ibid; J Kieya & R Nyaga *The Effects of Land Titling on Poverty in Kenya* (2010) 5. The provision is currently provided in the Land Act, No. 2 of 2012. The provisions had been made in the Registration of Titles Act (Cap 281) Laws of Kenya (now repealed).

[105] BD Ogolla & J Mugabe 'Land Tenure Systems and Natural Resource Management' in C Juma & J.B Ojwang (eds) *In Land We Trust: Environment, Private Property and Constitutional Change* (1996) 97.

[106] K Kanyinga *Re-Distribution from Above: The Politics of Land Rights and Squatting in Coastal Kenya* (2000) 40-45.

[107] PK Mbote 'The Land Question in Kenya: Legal and Ethical Dimensions in EW Gachenga et al (eds) *Governance, Institutions and the Human Condition* (2009) 226

[108] Ibid 227.

[109] Ibid 226.

The CESCR has underscored the essence of land tenure and its implication on protection against arbitrary evictions. The CESCR observes that secure tenure to land is a right of every individual and groups to effective protection against forced evictions by stating that:

> …notwithstanding the type of tenure, all persons should possess a degree of security of tenure which guarantees legal protection against forced eviction, harassment and other threats. States parties should consequently take immediate measures aimed at conferring legal security of tenure upon those persons and households currently lacking such protection, in genuine consultation with affected persons and groups.[110]

The foregoing demonstrates that there is a nexus between land tenure and forced evictions. Secure tenure to land is an important component for protection against arbitrary evictions.

2.3.3 Classification of Land in Kenya

The Constitution designates all the land into three categories namely public, private, and community land.[111] Ojwang observes that while the Constitution safeguards private interests in land, it has also accommodated historical dimensions associated with the broader community interests.[112] Ojwang notes that the Constitution has accommodated broader community interests by making specific provisions for the three categories of land.[113]

2.3.3.1 Public Land

Public land is land consisting of land lawfully held by the county and national governments and administered by the NLC.[114] Public land also entails land that is owned by the State and dedicated to specific public use and made available for private use at the discretion of the government.[115] Public land is land that neither falls within the category of private land or community land, nor is it declared to be public land by any Act of Parliament.[116] Public land tenure entails the phenomenon of the government as a private landowner.[117] The concept originated from the onset of colonialism when the Crown declared all waste and unoccupied land in the Kenyan protectorate as Crown land.[118]

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[110] General Comment No. 4 (note 37 above) Para 8 (a).
[111] Article 61(2) of the Constitution.
[112] Ojwang (note 101 above) 44.
[113] Ibid.
[114] Article 62 (2) & (3) of the Constitution.
[115] D Kangethe *An Evaluation of the Effects of Land Tenure on Land Use in Kenya: Evidence of Bondo, Busia and Siaya Districts* (2012) 2.
[116] The National Land Policy (note 77 above) 16.
[117] Ogolla & Mugabe (note 105 above) 104.
[118] Okoth-Ogendo (note 88 above) 1-10.

Public land includes land that is lawfully held, used or occupied by State organs, land transferred to the State through sale, reversion or surrender and land where individual or community ownership can be established by the legal process.[119] Public land also includes land with minerals as defined by law, specially protected areas, government forests, national parks and game reserves, animal sanctuaries and water catchment areas.[120] Public land includes roads, rivers, lakes, water bodies, territorial sea, continental shelf, exclusive economic zone, land between the high and low water marks any land not which is not classified as private or community land by law.[121]

2.3.3.2 Private Land

Private land consists of registered land held by an individual or a corporate entity or otherwise under freehold or leasehold tenure and any other land declared as private by legislation.[122] The legislations passed to regulate private ownership of land are discussed in Chapter 4.[123] Private land tenure traces its history from the introduction of colonial rule and the conceptions of property by the Crown.[124] Colonisation put in place a land policy that gave exclusive rights to non-African communities on land previously occupied by native communities.[125] The outbreak of the *Mau Mau* war in search for independence was mainly caused by grievances relating to land.[126]

Franceschi and Lumumba observe that the introduction of private land holding not only caused disruption of the customary system of land holding but also led to displacement of many individuals from their land.[127] Formal property laws have been equated with legality and the result has been that property laws have guarded formally registered property relegating informal tenure to the periphery and placing the people at risk of forced evictions.[128]

[119] Article 62(1) of the Constitution.
[120] Ibid.
[121] Ibid.
[122] Article 64 of the Constitution.
[123] Section 4.4 of Chapter 4.
[124] Kariuki et al (note 2 above) 200-201.
[125] Kangethe (note 115 above) 1.
[126] T Kanogo *Squatters and the Roots of Mau Mau 1905-1963* (1987) 1.
[127] L Franceschi & PLO Lumumba *The Constitution of Kenya: A Commentary* (2019) 288.
[128] Ibid.

2.3.3.3 Community Land

Community land is land that vests in and is held by communities, which are identified by similar community of interest, ethnicity and culture. Community land is attached to ethnic communities or distinct groups historically, socially and for beneficial use.[129] The Constitution defines community land as land that is lawfully held, managed and used by communities on the basis of ethnicity, culture or similar community of interests.[130] Community land also entails land lawfully registered in the names of group representatives, land transferred to a community as well as land declared to be community land by legislation.[131] Community land also includes community forests, lands traditionally held by the hunter gatherer communities, ancestral lands, shrines and trust lands by the county governments on behalf of communities.[132]

The Community Land Act (CLA)[133] was enacted to give effect to Article 63 of the Constitution which defines the term community as follows:

> …. a consciously distinct and organised group of users of community land who are citizens of Kenya and share any common ancestry, similar culture or unique mode of livelihood, socio-economic or other similar common interest, geographical space, ecological space and/or ethnicity.

CLA aims at recognising, protecting and registration of community land rights. It also aims at managing community land and elaborating the role of county governments in respect to unregistered community land.'[134] The role of CLA in protection against forced evictions of communities is discussed in Chapter 4 of this thesis on the Kenyan legal framework in the protection against forced evictions.[135] The study aims to establish whether or not the community land legislation has enhanced security of tenure of communities within the rural settings.

The case studies of *Ogiek* and *Endorois* indigenous peoples provide examples of community land that was not protected by law. The government adopted policies to conserve forests which led to forceful eviction of the two communities. The *Ogiek's* decision by the African Court on Human and Peoples' Rights (the African Court) and the *Endorois* decision by the

[129] T Gachagua 'Demystifying the Concept of Community Land: The New Order' (2015) 11(2) *Law Society of Kenya Journal* 151-176.
[130] Article 63(1) of the Constitution.
[131] Ibid Article 63(2).
[132] Ibid.
[133] Act 27 of 2016.
[134] Ibid the Preamble.
[135] Section 4.3 of Chapter 4.

African Commission on Human and Peoples' Rights (ACHPR) are considered subsequently in this chapter.[136]

There are a number of writers who have advocated for formalisation of tenure. De Soto succinctly states that formal property rights hold the key to poverty reduction by unlocking the property held informally by the poor. [137] De Soto argues that it is better for land to be formalised to enable landowners to acquire credit from banks, so that if they do not bother to get credit, those who can, may proceed and invest to boost the economy as a whole. De Soto supports this assertion by stating that:

> … a formalised private regime is the only means of which individuals are enabled to take advantage of increases in land values resulting from market integration, land scarcity or technological innovation. Informal communally based systems cannot afford to capture economic rent because there is no institutional mechanism allowing assignment of valuable economic rents to any specific person or group so individuals capture these rents thus a shift towards private property rights to access the new benefits accruing to them. Formalisation and individualisation of ownership is therefore the state's appropriate response to this demand.[138]

Gilbert agreed with De Soto's assertion by stating that it is correct that the lack of a legal title can inconvenience the poor.[139] Gilbert observes that occupants of newly formed settlements, long-established neighbourhoods, female-headed households, immigrant communities and minority groups feel insecure without a formal title. Gilbert further observes that lack of a legal title can complicate the process of buying and selling property and obtaining credit.[140]

In a contrary view, Musembi interrogated the claims that the procedural act of formalisation of property rights has a causal link with the empowerment of the poor people.[141] She explored this claim by examining Hernando de Soto's work in relation to similar arguments made in earlier policy prescriptions on formalisation of land in the rural sub-Saharan Africa especially Kenya with a long experimental history of titling in the region.[142] In Musembi's view, formalisation of tenure is not the key to secure land rights and eradication of poverty.[143]

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[136] Sections 2.5.1.1 and 2.5.1.2 of this chapter.

[137] H De Soto *The Mystery of Capital: Why Capitalism Triumphs in the West and Fails Everywhere Else* (2000) 6.

[138] Ibid.

[139] A Gilbert 'On the Mystery of Capital and the Myths of Hernando De Soto: What Difference Does Legal Title Make?' (2002) 24 (1) *International Development Planning Review* 8.

[140] Ibid.

[141] CN Musembi 'Breathing Life into Dead Theories about Property Rights: De Soto and Land Relations in Rural Africa' 28 (8) *Third Quarterly* (2007) 22-23.

[142] Ibid 7.

[143] Ibid.

Okoth-Ogendo in concurrence with Musembi stated that the political and economic advantages of formalisation of tenure against the social, cultural and historical complexities in land rights systems in Africa have been overrated.[144] Okoth-Ogendo cautioned against legislating land rights for the poor and recommended that effort should be directed towards supporting social practices that have widespread legitimacy rather than employing expensive means to replace them.[145] In his argument the tenure in informal settlements does not need to be formalised by issuance of formal titles.

Mbote and Odote proposed that informal land tenure should be recognised as a form of community land right.[146] In their view, this will address the issue of tenure insecurity within the informal settlements which comprise of both individual and communal aspects. Such a step would also be in tandem with the provisions of the Constitution which provides for equitable access and security of land rights. The Constitution in that respect provides that:

> …land in Kenya shall be held, used and managed in a manner that is equitable, efficient, productive and sustainable and in accordance with the principles of equitable access to land, security of land rights, sustainable and productive management of land resources, transparent and cost effective administration of land, sound conservation and protection of ecologically sensitive areas, elimination of gender discrimination in law, custom and practices related to land and property in land and encouragement of communities to settle land disputes through recognised local community initiatives consistent with the Constitution.

Indigenous peoples and the coastal communities hold land communally and therefore, community land tenure exists to date. The recognition of community land rights is an important component of protection of property, cultural and religious rights of indigenous communities.[147]

The following section addresses the problem of forced evictions in the Kenyan context under the themes of forced evictions in informal settlements, evictions of indigenous peoples and the case study of coastal communities which are not regarded within the context of indigenous peoples. The section evaluates the *Ogiek*, and the *Endorois* as indigenous peoples and the *Mijikenda* communities to demonstrate that forced evictions affect people who live in both rural and urban areas.

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[144] HWO Okoth- Ogendo '*Formalising* "*Informal" Property Systems: The Problem of Land Rights Reform in Africa* < https://learning.uonbi.ac.ke> accessed 25 August 2019 [1]-[5].
[145] Ibid.
[146] PK Mbote & C Odote 'Innovating Tenure Rights for Communities in Informal Settlements: Lessons from Mukuru' in C Odote & PK Mbote (eds) *Breaking the Mould, Lessons for Implementing Community Land Rights in Kenya* (2016) 54; Kariuki et al (note 2 above) 420.
[147] Gachagua (note 129 above) 151-176.

2.4 Forced Evictions in Informal Settlements

Informal settlements entail informal housing and dwellings built without requisite permission and without the full title to land and have become a formidable problem that face urban areas in developing countries.[148] Informal settlements result from unauthorised occupation of land, non-adherence to land use and building regulations.[149] That entails means that are carried out without any regularly prescribed procedure, but provides shelter to millions of people.

According to the UN-Habitat, informal settlements are residential areas with housing units which have been constructed on land where the occupiers do not have legal claim, or where occupiers live illegally.[150] The National Land Policy (the Policy) defined informal settlements as occupation of land without formal recognition and non-compliance with physical and land use planning requirements.[151] The Policy states that informal or spontaneous settlement is largely contributed by lack of security of tenure to land and failure to plan for land use and management.[152]

The Policy had proposed measures that the government is supposed to take in order to address the problem of informal tenure.[153] Key amongst them was to establish a legal framework on evictions based on international best practices and regularisation of existing informal settlements found on public and community land, and the establishment of a legal framework for transferring land belonging to absentee landlords at the cost of informal settlers who do not possess a formal title to land.[154]

The major causes of evictions in informal settlements are insecure land rights, conflicts in land rights and urban redevelopment.[155] The occupiers in informal settlements are the poor people with limited financial resources at their disposal.[156] Strydom and Viljoen refer to informal settlers as unlawful occupiers who are vulnerable, poor and with limited job

[148] S Romero 'Mass Forced Evictions and the Human Right to Adequate Housing in Zimbabwe' (2007) 5(2) *Northwestern Journal of International Human Rights* 1.
[149] M Huchzermeyer 'The Struggle for In Situ Upgrading of Informal Settlements: A Reflection on Cases in Gauteng (2009) 26(1) *Development Southern Africa* 59.
[150] UN-Habitat *The Challenge of Slums: Global Report on Human Settlements* (2003)10-12.
[151] The National Land Policy (note 77 above) 67.
[152] Ibid Para 209. The Policy recognises that many Kenyans live within informal settlements in slums and other squalid places. Informal settlements also create the problem of land planning and development.
[153] Ibid Para 211.
[154] Ibid Paras 184 & 209.
[155] Romero (note 148 above) 1-2.
[156] J Strydom & S Viljoen 'Unlawful Occupation of Inner-City Buildings: A Constitutional Analysis of the Rights and Obligations Involved' (2014) 17 (4) *Potchefstroom Electronic Law Journal* 1210-1211.

opportunities.[157] The occupiers do not possess formal titles to the land that they occupy and are thus prone to forced evictions.[158] There have been several cases of evictions in informal settlements in Kenya.

The problem of slum proliferation can be traced from colonial rule which took large tracts of land from locals and many people were pushed into reserves where they did not enjoy security of tenure.[159] The Crown designated residential areas with security of tenure mostly for people of European and Asian descent.[160] The aspect of overcrowding created slum settlements. The emergence of rural poor populations led to migration in search of cheap labour for the colonial masters.[161] According to the UN-Habitat, there was rapid urbanisation in the last five decades which has caused the growth of informal housing all around rapidly growing cities all over the world.[162]

Informal settlements in the capital city Nairobi have been categorised into settlements on public land or on private land without the authority of the land owners.[163] Public land mostly inhabited by informal occupants is usually reserved for environmental conservation, safety purposes or future development.[164] In most informal settlements, there are conflicts with the private owners of land who do not regard the rights of the occupants and always seek to forcefully evict the occupants.[165]

People living in informal settlements are not categorised into the three land tenure systems recognised in the Constitution namely private, public and community, since the occupants settle on either public or private land without permission.[166] Mbote and Odote observed that

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[157] Ibid.

[158] The Kenyan Section of the International Commission of Jurists, World Organization against Torture and Centre for Minority Rights Development: An Alternative Report to the UN Committee on Economic, Social and Cultural Rights *The Lie of the Land: Addressing the Economic, Social and Cultural Root Causes of Torture and other forms of Violence in Kenya* (2008). 17.

[159] EK Murimi 'Slum Upgrading in Kenya: A Double-Edged Sword for the Right to Adequate Housing' (2018) 14(1) *Law Society of Kenya Journal* 89-90.

[160] Ibid.

[161] OM Benard 'The Right to Housing in Kenya: From Law to Practice' (2015) 11(2) *Law Society of Kenya Journal* 35; Kanogo (note 126 above). The colonial government coerced the Africans into seeking wage employment by imposing taxes, creating reserves, disrupting economies and denying Africans from growing cash crops.

[162] UN-Habitat 2003 (note 150 above) 11-16.

[163] Ibid 13. According to the UN Habitat, the categorisation was done through the study in conjunction with the Government of Kenya Central Bureau of Statistics and the Nairobi City Council. The study identified the slum areas in the city and established the fact that informal settlements are both on public and private parcels of land.

[164] Mbote & Odote (note 146 above) 54.

[165] Ibid.

[166] Ibid 57.

people living in informal settlements do not enjoy full incidents of land ownership because of lack of formal title, but live under arrangements under informal land tenure that grants them a sense of legitimacy.[167] They argue that even though the Constitution explicitly provides for the three forms of tenure systems, it has provided an opportunity for provision of secure tenure for the occupants of informal settlements through 'the community tenure categorisation of community of interests.'[168]

2.4.1 Prevalence of Forced Evictions in Informal Settlements in Kenya

Forced evictions and demolitions in informal settlements perpetrated by actions by State officials and actions by non-state actors are prevalent and undermine the rights enshrined in the Bill of Rights. The evictions are carried out without due process and with excessive use of force or accompanied by other abuses.[169] Many occupiers in informal settlements lack clear protection from arbitrary rent increases and face unreasonable restrictions on use of the land they occupy.[170] Since informal settlements are not properly planned, it often necessitates the government to remove the occupiers and in most cases forcefully without taking into consideration their plight and wellbeing.[171]

The occupiers do not enjoy legal security of tenure since most informal settlements are on public or government owned and privately owned land.[172] The occupiers do not enjoy full privilege of ownership because they do not have formal titles to the land they reside in. This has contributed to vulnerability to forced evictions of the occupiers in informal settlements within urban areas. The following statistics indicate the prevalence of forced evictions within urban areas.

In the capital city, Nairobi, there are over 168 informal settlements with a combined population of 2 million people whose settlements are considered illegal and uncontrolled.[173] According to the Special Rapporteur on Adequate Housing, the Ministry of Lands and Housing in Kenya carried out evictions and demolitions on slum areas, mainly in Kibera, one

[167] Ibid 47-70.
[168] Ibid 57.
[169] L Juma 'Nothing but a Mass of Debris: Urban Evictions and the Right of Access to Adequate Housing in Kenya' (2012) 12(2) *African Human Rights Law Journal* 476.
[170] Ibid 477
[171] Ibid.
[172] Mbote & Odote (note 146 above) 49-55.
[173] Juma (note 169 above) 476-477.

of the largest informal settlements.[174] According to the Special Rapporteur, 150 000 people were rendered homeless by the evictions and 17 600 structures destroyed.[175] The Special Rapporteur reported that he did not receive any official report from the government but only relied on reports from non-governmental organisations.[176]

In 2018, the government through the Kenya Urban Roads Authority carried out an eviction in Kibera destroying hundreds of houses and at least five schools.[177] The eviction left more than 30 000 people homeless and 2 000 children unable to go to school.[178] The evictions were carried out without adequate notice, without any arrangements for resettlement and without compensation. The affected people spent nights in the open during the cold season.

The UN-Habitat reported that there are over 2 million people who live in informal settlements with threats of forced evictions facing people who live in Kibera, the largest informal settlement in the capital city, Nairobi.[179] The UN-Habitat concurred with the report by the Special Rapporteur which stated that over 300 000 informal settlers of Kibera slums in Nairobi were forcefully evicted by ministries within the Kenyan national government on the pretence that they were living in dangerous areas.[180] The justification given by the government for the evictions in the Kibera slums was that occupiers were living on land reserved for future expansion of road and power lines as well as land planned for railways[181]

The Kenya National Commission on Human Rights (KNCHR) has documented several cases of forced evictions within informal settlements. In November 2011, forced evictions and demolitions were carried out within a suburb of Nairobi on land belonging to the Kenya Airports Authority rendering 229 000 people homeless.[182] In July 2011, the City Council of

[174] UNGA 'Report of the Special Rapporteur on Adequate Housing as a Component of the Right to an Adequate Standard of Living' (2004) UN Doc E/CN.4/2005/48 Para 72.
[175] Ibid.
[176] Ibid Para 73.
[177] United Nations Office of the High Commissioner Kenya: Stop Forced Evictions from Nairobi's Kibera Settlement (2018) < https://www.ohchr.org/en/press-releases/2018/07> accessed 16 June 2023.
[178] Ibid.
[179] UN Habitat *Forced Evictions, Global Crisis, Global Solutions A Review Of the Status of Forced Evictions Globally Through the Work of the Advisory Group on Forced Evictions, UN Habitat and Other International Actors* (2011) < www.scribd.com.documents> accessed 12 March 2018 [36].
[180] Ibid.
[181] KM Otiso 'Evictions in Nairobi: Why the City has a problem and what can be done' in *The Star* (Nairobi) 28 July 2018. See also UN Habitat 2011 (note 179 above) 36-38. The 2011 Report has documented various cases of forced evictions within the capital city Nairobi in Kibera slums, the biggest informal settlement in Kenya.
[182] KNCHR *Handbook on Forced Evictions in Kenya: Roles and Responsibilities of the Government (National and County) and Private Developers* (2014). See also <www.knchr.org> accessed 30 July 2022. The KNCHR is a commission established by the Kenya National Commission on Human Rights Act 14 of 2011.

Nairobi (now the County Government of Nairobi) demolished 100 homesteads and 470 business premises within the Kabete area of Nairobi.[183] In 2011-2012, KNCHR documented 31 cases of forced evictions in different informal settlements within Nairobi, while Machakos and Mombasa counties further documented an incident of forced evictions of 168 families by a private developer in Mombasa county in December 2013.[184]

In May 2020 during the Covid-19 pandemic, more than 1 500 people were forced out of their homes in the Ruai area within Nairobi and rendered them homeless and in need of assistance.[185] The occupiers lived on land which the Nairobi City Water and Sewerage Company (NCWSC), a State parastatal, claimed ownership.[186] The occupiers claimed that they had purchased the land from the county Government of Nairobi.[187] The NCWSC did not give adequate notice before the eviction was carried out.[188] The eviction was carried out at night and during curfew hours and the government did not provide the occupiers with alternative shelter, food, access to water and sanitation and any form of compensation.[189]

The evictions were carried out with the help of armed police.[190] The evictions resulted in displacement of people as well as destruction of property worth millions of Kenyan shillings.[191] The affected residents were neither given due notice of the evictions nor provided with alternative resettlement or a plan for relocation. The incidents of evictions documented by UN-Habitat and KNCHR evictions were forceful and disruptive. The evictions caused massive destruction of property and rendered the victims homeless.[192]

The following section discusses Kenyan case law on evictions in informal settlements. A number of cases have been decided on by the courts regarding the problem of forced evictions within informal settlements. The cases decided show that there is a gap in the Kenyan policy and legislation in respect of evictions that adhere to international best

[183] Ibid.
[184] Ibid.
[185] UN Office of the High Commissioner *COVID-19 Crisis: Kenya Urged to Stop all Evictions and Protect Housing Rights Defenders* (2020) < www.ohchr.org/en/press-releases/2020/05> accessed 10 October 2022.
[186] Ibid.
[187] Ibid.
[188] Ibid. See also Norwegian Refugee Council *An Unnecessary Burden: Forced Evictions and Covid-19* (2020) < https://evictions.nrcsystems.net/dashboard.php> accessed 15 October 2022.
[189] Juma (note 169 above) 471-472
[190] Ibid.
[191] Ibid.
[192] Kitiwa (note 35 above) 97.

practices and standards. The cases evaluated demonstrate that forced evictions are not only carried out within the capital city Nairobi, but are also carried out in other towns. Chapter 5 of this thesis will elaborate the reliefs and remedies given by the Kenyan courts in forced eviction cases.[193]

2.4.1.1 *Susan Waithera & 4 Others v The Town Clerk, Nairobi City Council & 2 Others*

In the *Susan Waithera* case,[194] the petitioners sought conservatory orders restraining the Town Clerk and officials from the Nairobi City Council from forcefully evicting them from their settlements. Susan Waithera and the other petitioners were living in informal settlements within the Kitisuru location within the county of Nairobi and presented the petition on their own behalf and on behalf of thousands of poor villagers who resided in the area. The petitioners argued that the respondents dutifully owed them among other things the right to sanitation, housing, dignity and freedom from cruelty and degrading treatment.

While granting the orders, the High Court noted that Kenya needed to develop legal guidelines to address the concern of evictions within informal settlements by stating that:

> …Kenya should develop appropriate legal guidelines on forced eviction and displacement of people from informal settlements so that if people have to be evicted from such settlements the act is done without violating people's constitutional rights and without causing extreme suffering and indignity to them.[195]

The High Court ruled that inappropriate legal guidelines on forced eviction aggravates displacement of people from informal settlements and further enhances vulnerability of occupiers to systemic forced evictions. The High Court stated that whilst evictions may at times be inevitable, it should be done without violating the constitutional rights and should be carried out without causing suffering and indignity of the affected people.[196]

The High Court in elaborating on the procedural protection from forced evictions of the petitioners stated that:

> …the petitioners have resided on the properties where they are being evicted from for many years. It is unreasonable and indeed unconstitutional for the respondents to give the petitioners one or two day notice to move out of their respective homes even without giving them any reason thereof and immediately upon expiry of the short notice embark on forceful eviction and demolition of their homes. The petitioners ought to be treated with dignity as required by the Constitution. It is

[193] Section 5.4 of Chapter 5.
[194] (2011) eKLR.
[195] Ibid 9.
[196] Ibid 9-10.

> unconstitutional to forcefully evict such a large number of people from dwellings where they have lived for more than forty years and render them homeless overnight. The government has a constitutional obligation to provide them alternative housing.[197]

The High Court relied on provisions of international law[198] and comparative law such as South African eviction and right to housing jurisprudence in deciding the matter and issuing conservatory orders for the petitioners to remain in occupation of their informal settlements.[199] In relying on jurisprudence from South Africa, the High Court acknowledged that significant evictions jurisprudence has been developed by South Africa and such jurisprudence may be relevant in informing Kenya's own legislative reforms. An in-depth critique on the role of international law and drawing on best practice from another jurisdiction are discussed in the subsequent chapters of this thesis.

The High Court considered the length of time that the petitioners had been living on that land which was close to four decades before recommending the application of the principles in the South African *Grootboom* case.[200] The principles include adoption of a reasonable policy within the State's available resources which would ensure access to adequate housing over time.[201] The principles also include regard for the social, economic and historical contexts of widespread deprivation, making short, medium and long term provision for housing needs and also giving special attention to the needs of the most vulnerable to homelessness after eviction.[202]

Juma observes that the case demonstrates that protection of occupiers from arbitrary evictions should override the duty of physical planning that the county government might have in respect of the property in question.[203] He further observes that the case addressed the aspect of striking a balance between property rights and constitutional rights.[204] The case demonstrates that even though county or municipal governments have physical planning laws, constitutional rights of occupants are paramount and the government should ensure that

[197] Ibid 7.
[198] The High Court made reference to the provisions to the CESCR General Comment No. 4 (note 35 above).
[199] *Republic of South Africa & Others v Grootboom & Others* (2001) (1) SA 46 (CC) and *Modderklip Boerdery v President Van Die Rsa En Endere* (2003) (6) Bc Lr 638(T). See the *Susan Waithera* case (note 191 above) 10-11.
[200] The *Susan Waithera* case (note 194 above) 6.
[201] Ibid 7. See also Article 43(b) of the Constitution.
[202] Ibid 10.
[203] Juma (note 169 above) 494-495.
[204] Ibid.

evictions, where inevitable, are carried out in a humane way, upon provision of adequate alternative accommodation.

2.4.1.2 *Ibrahim Sangor Osman v The Minister of State for Provincial Administration and Internal Security*

The *Ibrahim Sangor Osman* case[205] concerned people living in Madina location within the county of Garrisa in the Northern part of Kenya who were rendered homeless and their property destroyed during an eviction to facilitate construction of a road. Those evicted included children, women and the elderly.[206] The petitioners were evicted from unalienated public land in respect of which title deeds have not been issued within the jurisdiction of the county.[207] The petitioners had put up permanent and semi-permanent dwellings in which they were living prior to eviction.

The evictions were carried out without prior consultations, written notices of court orders and their houses demolished.[208] The eviction was sanctioned by the State and carried out by State officials. Upon eviction, the petitioners were not provided with alternative land or housing.[209] The petitioners were not given an opportunity of decision making in respect of the eviction. The eviction resulted in relocation to areas that did not have essential services such as education and health.[210]

The petitioners claimed that the eviction had violated their right to dignity, housing, sanitation among other rights.[211] The petitioners further claimed that forcible and violent eviction through demolition of their homes without according them alternative shelter or accommodation was a violation of their right to property and others SERs guaranteed under Constitution.[212] The State and its officials, who were respondents in the case, did not defend the case.

[205] Constitutional Petition No. 2 of 2011.
[206] Ibid 2.
[207] Ibid.
[208] Ibid 2-5.
[209] Ibid.
[210] Ibid.
[211] Ibid.
[212] Ibid 6-10. The right to protection of property is guaranteed under Article 40 of the Constitution and SERs are guaranteed under Article 43 of the Constitution.

The High Court ruled that the eviction violated the fundamental right of the petitioners to accessible and adequate housing as enshrined in the Constitution.[213] The High Court also ruled that the eviction rendered the petitioners vulnerable to other human rights violations since they were rendered homeless and without means of livelihood.[214] The High Court further ruled that eviction grossly undermined their right to dignity and respect. The eviction also created a crisis situation that threatened the existence of the petitioners.[215]

The High Court restrained the respondents from any further evictions or demolitions.[216] More importantly, the High Court ordered the respondents to grant alternative accommodation to the petitioners and such accommodation had to include amenities, facilities and schools that were subsisting on the land at the time of the evictions and demolitions.[217] Additionally, the High Court ordered that the State officials and the affected people should mutually agree on the modalities of provision of alternative accommodation.[218] The High Court granted further relief in the form of damages to each of the petitioners.[219] More importantly, the High Court underscored the essence of Article 11 of the ICESCR and the General Comments by the CESCR[220] in the context of Kenya's obligation to respect, protect and enforce the rights provided in the international legal instruments.[221]

The case demonstrates emblematic of the problem of forced evictions within informal settlements. The case demonstrates the resolve by Kenyan courts, in some cases, to protect the constitutional right not to be evicted in an arbitrary manner. The case further demonstrates the disproportionate effect of forced evictions on the poor segment of the population. Strydom & Viljoen observe that informal or unlawful occupation in urban areas

[213] Ibid 7.
[214] Ibid.
[215] Ibid.
[216] Ibid.
[217] Ibid.
[218] Ibid.
[219] Ibid.
[220] Article 11 (1) of the ICESCR provides that 'the States Parties to the present Covenant recognise the right of everyone to an adequate standard of living for himself and his family, including adequate food, clothing and housing, and to the continuous improvement of living conditions. The States Parties will take appropriate steps to ensure the realisation of this right, recognising to this effect the essential importance of international cooperation based on free consent.'
[221] The *Ibrahim Osman Sangor* case (note 205 above) 14 -16.

has led to increased legal disputes between vulnerable occupiers and individual landowners, State and non-state agents.[222]

The following section discusses forced evictions of indigenous peoples. The discussion includes forced eviction jurisprudence by Kenyan and regional courts.

2.5 Forced Evictions of Indigenous Peoples

2.5.1 Definition of Indigenous Peoples

Barume has defined indigenous communities as those communities whose ways of life were not taken into account by most post-colonial African policies, an injustice that led to marginalisation including dispossession of their ancestral lands and inaccessibility of rights and freedoms enjoyed by other communities.[223] Das has defined indigenous peoples as natives who lived on their lands before settlers from different cultures and ethnic origins came and dominated them through conquest, occupation, settlement and other means.[224] Das provided examples of the Bushmen of Botswana, the Ainu of Japan and the Pygmies of Central Africa, among others.[225]

The International Labour Organisation (ILO) and the UN have provided definitions of indigenous peoples. In 1957, the ILO adopted the Convention Concerning the Protection and Integration of Indigenous and Other Tribal and Semi-Tribal Populations in Independent Countries (the Convention).[226] This Convention provided a definition of indigenous peoples by stating that indigenous peoples are:

> …members of tribal or semi-tribal populations in independent countries which are regarded as indigenous on account of their descent from the populations which inhabited the country, or a geographical region to which the country belongs, at the time of conquest or colonisation and which, irrespective of their legal status, live more in conformity with the social, economic and cultural institutions of that time than with the institutions of the nation to which they belong.[227]

The Convention applies to 'members of tribal or semi-tribal populations in independent countries whose social and economic conditions are at a less advanced stage than the stage

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[222] Strydom & Viljoen (note 156 above) 1.

[223] AK Barume *Land Rights of Indigenous Peoples in Africa with Special Focus on Central, Eastern and Southern Africa* (2014) 10.

[224] J.K Das *Human Rights and Indigenous Peoples* (2011) 1.

[225] Ibid.

[226] ILO *Convention (No 107) Concerning the Protection and Integration of Indigenous and Other Tribal and Semi-Tribal Populations in Independent Countries* (1957) (Adopted in June 1957 by the International Labor Conference at its 40th session, 328 UNTS 247, entered into force on 2 June 1959).

[227] Ibid Article 1 (b).

reached by the other sections of the national community.'[228] The Convention states that the term 'semi-tribal' includes groups and persons who are not yet integrated into the national community and are in the process of losing their tribal characteristics.[229]

Burman observes that the tribal and semi-tribal populations are not static entities since they are in the process of losing their ethnic identities and will be integrated to the national community in the long run.[230] Burman further observes that indigenous populations possess attributes of tribal and semi-tribal populations and constitute a distinct international entity arising out of the fact that they are victims of conquest or colonisation which enabled the migrants to establish their hegemonic domination.[231]

The Convention (No. 169) Concerning Indigenous and Tribal Peoples in Independent Countries provides that the Convention applies to tribal peoples in independent countries with distinct social, cultural and economic conditions which distinguishes them from other communities and whose status is regulated by customs or special laws and regulations.[232] The Convention also applies to peoples in independent countries recognised as indigenous with their own social, economic, cultural and political institutions and having inhabited the country or a geographical area before the time of conquest or colonisation and the establishment of the present State boundaries.[233] The Convention states that self-identification of peoples as indigenous or tribal, is a fundamental criterion for determining the groups to which the Convention applies. Additionally, the use of the term 'peoples' in the Convention is not construed as to have implications in regard to the rights which may attach to the term under international law.[234]

Burman compares Convention 107 and Convention 169 and observed that ILO's perception of the tribal and indigenous peoples in the latter is less loaded with ethno-centric bias compared with the former.[235] Yupsanis observes that Convention 169 as opposed to Convention 107 adopts a modern, non-paternalistic, non-assimilative approach by discarding

[228] Ibid Article 1(a).
[229] Ibid Article 1(2).
[230] BK Burman *'Indigenous' and 'Tribal' Peoples and the U.N. and International Agencies* (1995) 3.
[231] Ibid 3-5.
[232] ILO *Convention (No 169) Concerning Indigenous and Tribal Peoples in Independent Countries* (1989) (Adopted by the International Labor Conference on 27 June 1989 and entered into force on 5 September 1991). Article 1 (a).
[233] Ibid Article 1 (b).
[234] Ibid Articles 2 & 3.
[235] Burman (note 230 above) 4.

the term 'integration' from its title and preamble.[236] Yupsanis further observes that Convention 169 adopts a new approach by replacing the term 'populations' used in Convention 107 with that of 'peoples' which has profound significance. The significance of recognising 'peoples' as opposed to 'populations' is that under international law, peoples enjoy the right of self-determination.[237] The other significance is that the assimilationist orientation in Convention 107 has been abandoned in light of developments in international law which recognises the aspirations of indigenous peoples to maintain and develop their identities, languages and religion as well as exercise control over their own institutions, ways of life and economic development.[238]

Jose Martinez Cobo, the special rapporteur to the UN Human Rights Sub-Commission on Prevention of Discrimination and Protection of Minorities made his final report which included among other issues, the definition of indigenous peoples.[239] The special rapporteur approached his definition by identifying four tasks. Firstly, the special rapporteur intended to establish a working definition to be used in the collection of information for the study and secondly, to identify populations that can be regarded as indigenous in the individual countries. Thirdly, the special rapporteur used a comparative study of all the definitions of indigenous peoples' in all the countries' individual documents and fourthly, he used the definition of indigenous populations within the international perspective.[240] The special rapporteur used a wide range of criteria and formulae for the definition of indigenous peoples and attached great importance to ancestry, culture, language self-identification and acceptance as critical elements in the definition of indigenous peoples.[241] The special rapporteur defined indigenous peoples as:

> …indigenous communities, peoples and nations are those which, having a historical continuity with pre-invasion and pre-colonial societies that developed on their territories, consider themselves distinct from other sectors of the society now prevailing in those territories, or parts of them. They form at present non-dominant sectors of society and are determined to preserve, develop and transmit to future generations their ancestral territories and their ethnic identity, as the basis of

[236] A Yupsanis 'ILO Convention No. 169 Concerning Indigenous and Tribal Peoples in Independent Countries 1989–2009: An Overview' (2010) 79 *Nordic Journal of International Law* 436-437.
[237] Ibid.
[238] Ibid.
[239] UN Human Rights Sub-Commission on Prevention of Discrimination and Protection of Minorities *Study of the Problem of Discrimination against Indigenous Populations* (1984) UN Doc E/CN.4/Sub.2/1983/21/Add.6.
[240] Ibid Para 1 (a)-(d).
[241] UN Human Rights Sub-Commission on Prevention of Discrimination and Protection of Minorities *Study of the Problem of Discrimination against Indigenous Populations Conclusions, Proposals and Recommendations* (1987) UN Doc E/CN.4/Sub.2/1986/7/Add.4. Paras 21, 362-368.

> their continued existence as peoples, in their own cultural patterns, social institutions and legal systems.242

This thesis adopts the definition of indigenous peoples made by the special rapporteur. The phenomenon of indigeneity is caused by among other factors, their distinctive cultures, their ways of life and numerical inferiority.[243] Neglect and marginalisation of their belief and practices has led to the decline of indigenous peoples and their knowledge.[244] There have been attempts to replace the traditional beliefs and practices by replacing them with the universal practices derived from western cultures.

2.5.2 Prevalence of Forced Evictions of Indigenous Peoples

The dispossessions of the indigenous peoples of land and resources by dominant communities have taken place systematically over a period of time. Das observes that the central element for demand by the indigenous peoples is the right to their traditional lands and control of resources since their survival as identifiable, distinct societies and cultures are seriously endangered by the dominant groups.[245] Das also observes that indigenous groups the world over have always considered the existing legal regimes inadequate in protection of their plight and have demanded special protection for their lands and natural resources.[246]

Forced evictions of indigenous communities impoverish the communities socially, economically and culturally.[247] According to the study by the African Commission's Working Group on Indigenous Populations/Communities, legislation and interest by many States with regard to land favour individual private land tenure systems.[248] The report by the Working Group further states that:

> …in most contests, States' legislations and interests with regard to land rights favour individual and private land tenure systems. This is a specific problem for most indigenous populations and communities, who continue to practise customary land ownership and more specifically communal

[242] UN Human Rights Sub-Commission on Prevention of Discrimination and Protection of Minorities *Preliminary Report of the Study of the Problem of Discrimination against Indigenous Populations* (1972) UN Doc E/CN.4/Sub.2/L566 Para 34.
[243] Das (note 224 above) 43-44.
[244] VO Wasonga, D Kambewa & I Bekalo 'Community Based Natural Resource Management' in W Ochola et al (eds) *Managing Natural Resources for Development in Africa: A Resource Book* (2013) 196.
[245] Das (note 224 above) 58-60.
[246] Ibid 58.
[247] Ibid 29.
[248] Ibid.

land ownership. As a result, most indigenous peoples' rights to land are not safeguarded by their respective governments.[249]

The Working Group observed that the land problems which the indigenous peoples face today can be traced directly to two aspects. Firstly the colonial land policies and laws that favoured individual private land tenure systems and secondly, the general attitude towards both the environment and the indigenous peoples.[250]

There is an assumption that the land occupied by pastoralists and hunter and gatherer communities is empty and is available for alienation at all levels.[251] This phenomenon is caused by lack of legal titles to the land and national legislation that do not provide for communal holding of land. The assumption that land occupied by indigenous peoples is *terra nullius* has also contributed to the problem of forced evictions. Forced evictions of indigenous people are ostensibly carried out to protect forests and forest resources. This is because most communities live in forests which include the Mau forest, Mt. Elgon Forest, Kipkurere forest, Embobut forest among other forests mainly found within the counties of the Rift Valley.[252]

Land is important to indigenous peoples not only as a factor of production but also the medium that defines and binds together social and spiritual relations across generations.[253] The Kenyan Commission of Inquiry into the Land Law System of Kenya on Principles of a National Land Policy Framework, Constitutional Position on Land and New Institutional Framework for Land Administration stated in its final report that land belongs to a vast family of which many are dead, few are living and countless who are still unborn.[254] The National Land Use Policy (NLUP) states that the relationship between the indigenous peoples and their land has been eroded because of dispossessions or forced eviction from their

[249] Ibid 30.
[250] Ibid.
[251] Report of the African Commission's Working Group of Experts on Indigenous Populations/ Communities *Resolution on the Rights of Indigenous Populations/Communities in Africa* (2003) Adopted by The African Commission on Human and Peoples Rights at its 28th Ordinary Session in 2003 [21].
[252] Kitiwa (note 35 above) 96.
[253] Barume (note 223 above)
[254] Republic of Kenya *Report of the Commission of Inquiry into the Land Law System of Kenya on Principles of a National Land Policy Framework, Constitutional Position on Land and New Institutional Framework for Land Administration* (2002) 19.

traditional lands and sacred sites.[255] NLUP further identifies the need to protect the land and resources belonging to indigenous peoples as a panacea to physical and cultural survival.[256]

Land rights remain a critical issue for indigenous peoples in Kenya. Development projects such as mining, forestry and agricultural programmes continue to displace indigenous peoples from their lands.[257] Forced evictions of the *Ogiek* and the *Endorois* communities from their land have been prevalent, justified by development projects such as the extractives industry. The communities have made efforts to reclaim their land rights through litigation in national and regional courts.

2.5.1.1 The *Ogiek* Community

The *Ogiek*, is a hunter and gatherer indigenous community. The community has a distinctive history of interaction with their land and the natural environment living in Mau forest within the Rift Valley region of Kenya as its ancestral land. The community has been forcefully evicted from its land, firstly by the colonial administration and subsequently by the post-independence successive governments.[258] In 2019, the ethnic population of the community totalled 52 596 people.[259] They live across the Mau Escarpment of the Kenyan Rift Valley Province in a land area measuring 400 000 km^2 and have lived there for many generations.[260]

In 1974, the Mau forest which was the original habitat of the community was declared a protected forest area by the government and the members of the community were evicted without prior consultation or compensation.[261] The community was left homeless and without a means of livelihood after the evictions.[262] The community was reduced to permit seekers to obtain grazing rights within the so-called protected areas and imposition of controlled

[255] Republic of Kenya *Sessional Paper No. 1 of 2017 on National Land Use Policy* (2017) 27.
[256] Ibid 27-28.
[257] Ibid. The development projects that mostly affect indigenous peoples are the extractive industries. See the Report of the African Commission's Working Group on Indigenous Populations/ Communities *Extractive Industries, Land Rights and Indigenous Populations'/Communities' Rights, East, Central and Southern Africa* (2017) Adopted by The African Commission on Human and Peoples Rights at its 58th Ordinary Session 2016 [107].
[258] N Sophia, A Susan & O Caleb 'Forces that Occasioned the Mau *Ogiek* People's Ethnic Dress, Kenya' (2012) 13 *International Journal of Humanities and Social Science* 192.
[259] The 2019 Population Census Report (note 79 above) 423.
[260] The Alternative Report to the UN Committee on Economic, Social and Cultural Rights 2008 (note 158 above) 27.
[261] Kimaiyo JT *Ogiek Land Cases and Historical Injustices 1902-2004* (2004) <freeafrica.tripod.com/ogiekland/book.htm> accessed 15 March 2020.
[262] Report of the African Commission's Working Group on Indigenous Populations/ Communities 2003 (note 251 above) 26.

farming and livestock grazing fees were the new mode of harassment.[263] According to the Minority Rights Group International, the evictions by the government were done under the disguise of protection of the environment whereas the intention was to carry out illegal logging rather than promotion of the community's traditional and sustainable livelihoods.[264]

The community laid claim to the ancestral title of the entire forest area and this position was vindicated by the Report of the Prime Minister's Task Force on the Conservation of the Mau Forest Complex (Mau Task Force Report),[265] which acknowledged that the community had lived in the forest before the forest was gazetted in 1932. The initiatives by the government through settlement schemes had not benefited the community even though excision of the forest was done under the disguise of resettling it.[266] The task force established that the beneficiaries included non-deserving individuals including political leaders, government officials and companies and the allocations were carried out by unauthorised persons.[267]

The community sought redress in the local court through the case of *Francis Kemai & Others v Attorney General & 3 Others.*[268] The case concerned members of the community who were evicted from their land in the forest and sought relief from the High Court for a declaration that the eviction from their land by the defendants contravened their fundamental rights.[269] The applicants argued that they had lived in the forest since time immemorial and had continued living on it even after the Crown declared the land a government forest.[270]

The Attorney General, on behalf of the government argued that the applicants were not the genuine members of the community, and that they had not lived in the forest since time immemorial as they claimed. The respondents claimed that the genuine members of the community had been settled by the government in the Sururu, Likia and Teret areas of the Rift Valley Province.[271] The respondents claimed that the part of the forest inhabited by the applicants was a water catchment area, and the government had given applicants notice to vacate the forest with immediate effect since they had entered and settled there unlawfully.

[263] Ibid.
[264] Centre for Minority Rights *African Court issues Historic Ruling Protecting Rights of Kenya's Ogiek Community* (2013)< https://minorityrights.org> accessed 15 August 2019.
[265] Republic of Kenya *Report of the Prime Minister's Task Force on the Conservation of the Mau Forest Complex* (2009).
[266] Mbote et al (note 93 above) 82-83.
[267] The Mau Task Force Report (note 265 above) 12.
[268] (2006) 1 KLR (E&L) 326.
[269] Ibid Para 1 (b).
[270] Ibid Para 2.
[271] Ibid Para 4.

The respondents argued that they had not harassed the applicants, but instead they had advised them to vacate the government gazetted forest peacefully.[272] The forest had been gazetted under the Forests Act (the Act).[273] The Act aimed at ensuring that the flora and fauna are protected and any activity concerning cutting, grazing, and removal of forest produce or disturbance of the flora could not be allowed except with the permission and discretion of the Director of Forestry.[274]

The High Court ruled that eviction of the community from the forest did not deprive the community of the means to livelihood.[275] The High Court further stated that the applicants did not provide evidence to demonstrate discrimination on the part of the government against the community.[276] The High Court made the assumption that the community had embraced modernity and had moved away from their traditional way of life, that of living in the forest.[277]

The Act had adversely affected the way of life of the community as an indigenous community that depended on the forest. According to the High Court, the community had not complied with the requirements of the Act to obtain licences to occupy the forest. The High Court did not give the relief sought by the applicants arguing that the community was no longer dependent on the forest for their survival.[278] The High Court, in an affront to the rights of the community stated that:

> …the community's right to life has not been contravened by the forcible eviction from the forest. It is themselves who wish to live as outlaws with no respect for the law conserving and protecting forests. It is themselves who do not want the public forest protected to sustain their lives and those of others.[279]

The *Francis Kemai* case demonstrates the unwillingness of the High Court to vindicate the rights of the community to live in the forest. The High Court established that the applicants were harming the environment and declined to address the claims of the applicants based on

[272] Ibid Para 5.
[273] Cap 385 Laws of Kenya now repealed by the Forest Conservation and Management Act 34 of 2016.
[274] Ibid the Preamble to the repealed Act.
[275] Ibid Para 19.
[276] Ibid Para 29.
[277] Ibid Para 38.
[278] The *Francis Kemai* case (note 268 above) Para 38. The High Court ruled that the community consisted of migratory people who depended on the climate.
[279] Ibid Para 39.

customary land rights of the community.[280] The case demonstrates the negative attitude towards the community as indigenous peoples seen as primitive, backward and underdeveloped. The case failed to recognise the customary land rights, stereotyped and discriminated against the community, a phenomenon that has contributed to impoverishment, a threat to its culture and survival as indigenous peoples.

The community also sought court redress in the Environment and Land Court (ELC) through the case of *Joseph Letuya & 21 Others v Attorney General & 5 Others.*[281] The case concerned an application by members of the community who had been living in the East Mau Forest, which was gazetted as their ancestral land.[282] The applicants stated that members of the community derived their livelihood from food gathering, hunting and peasant farming.[283]

The applicants contended that in 1993, the government started allocating the land which the community was occupying to other persons, prompting continued harassment and eviction of the community from the land.[284] The applicants argued that forced eviction from their ancestral land contravened their right to protection by the law and the right not to be discriminated against under Sections 77, 81 and 82 of the 1969 Constitution.[285] The applicants sought a declaration from the ELC that their right to life had been breached by the forcible eviction from their land and requested the court to restrain the respondents from allocating the land to other persons in exclusion of the community and interfering with the use of the land by the community.[286]

The respondents submitted that the applicants did not have a cause of action and were not entitled to any of the remedies sought since they did not establish any legal right over the property in question.[287] The respondents also claimed that the applicants had failed to demonstrate what actions violated the constitutional rights of the petitioners.[288] The

[280] I Ndegwa 'A Roof over Wanjiku's Head: Judicial Enforcement of the Right to Housing under the Constitution of Kenya' in *Judicial Enforcement of Social-economic Rights under the New Constitution: Challenges and Opportunities for Kenya* (2011) 151; Barume (note 223 above) 101-102.
[281] (2014) eKLR.
[282] Ibid
[283] Ibid
[284] Ibid
[285] Ibid 2 &3.
[286] Ibid.
[287] Ibid 5.
[288] Ibid.

respondents further claimed that the forest was not reserved as ancestral land and the community was living on the land contrary to the forest legislation.[289]

The ELC found that there were several issues for determination. The first issue was whether the members of the community had recognisable rights arising from their occupation of parts of East Mau Forest. The second issue was whether the rights of the community had been infringed by their eviction and allocations of land in the forest to other persons. The third issue was whether creation of the settlement schemes by the government within the forest was ultra *vires* and null and void and fourthly, whether the applicants are entitled to the relief sought.[290]

The ELC declared that the government had deprived the community of the right to life, right to dignity and SERs under the Constitution and further deprived the community of its means of livelihood by the forcible eviction from the forest without resettlement. The ELC stated that:

> …this court hereby declares that the right to life protected by Section 71 of the 1969 Constitution and Article 26 of the 2010 Constitution, right to dignity under Article 28 of the 2010 Constitution and the economic and social rights under Article 43 of the Constitution of the affected members of the Ogiek including the Applicants has been contravened, and is being contravened by their forcible eviction from the said locations without resettlement and that the said members of the Ogiek community have been deprived of their means of livelihood.[291]

The ELC directed the National Land Commission to identify and register the members of the community within one year and identify land for their resettlement.[292] The ELC did not order restitution of the land or compensation to the applicants and dismissed all the reliefs sought.[293] The ELC stated that any other determination would encourage vexatious litigation and interminable lawsuits in the courts which would have dire consequences for the country.[294]

Barume observes that the *Joseph Letuya* case illustrates the delaying tactics being used by the government against indigenous people's court cases on arbitrary evictions. He states that:

> …this case represents one of the best illustrations of delays being used as tactics by a government against indigenous people's court cases on land. In this case, a government buys time to engineer

[289] Ibid. The forest legislation referred to was the Forest Act (note 273 above).
[290] Ibid 7.
[291] Ibid 19.
[292] Ibid. The National Land Commission is established by Article 67 of the Constitution.
[293] Ibid Para 41.
[294] Ibid.

> new actions and assaults on the disputed lands. This is also a case that could be taken to international mechanisms such as the ACHPR given that the unwillingness of the judges and collusion with the government seem apparent.[295]

The community was frustrated by the decisions of the cases in Kenyan courts and national policy processes regarding the plight of the community. The community through non-governmental organisations such as the Centre for Minority Rights Group International, the *Ogiek* Peoples' Development Programme and the Centre for Minority Rights filed the case at the ACHPR after failing to obtain domestic remedies.[296]

The ACHPR received a Communication from two organisations both acting on behalf of the *Ogiek* community on 14 November 2009. The Communication concerned the eviction notice issued by the Kenya Forestry Service in October 2009, which required the community and other settlers of the Mau Forest to leave the area within 30 days.[297] The ACHPR issued an order to the government of Kenya (the government) to suspend the implementation of the notice.[298] The government did not respond to the concerns and the order by the ACHPR. The ACHPR referred the case to the African Court as the applicant against the government as the respondent.

The ACHPR referred the case to the African Court on the basis of serious human rights violations by a State and for the first time, the African Court ruled on a case concerning indigenous peoples.[299] The community alleged violations of Articles 1, 2, 4, 8, 14, 17(2) and (3), 21, and 22 of the African Charter on Human and Peoples' Rights (the Charter). The African Court found that the government had violated the land rights of the community and its right to property as provided for in Article 14 of the Charter read in light of the United Nation Declaration on the Rights of Indigenous Peoples.[300]

The African Court reiterated that the government had violated the land rights of the community by expelling it from its ancestral lands against its will, without prior consultations and without respecting the conditions of expulsion in the interest of public need.[301] The

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[295] Barume (note 223 above) 98.

[296] Centre for Minority Rights *African Court Issues Historic Ruling Protecting Rights of Kenya's Ogiek Community* (2013) <https://minorityrights.org> accessed 10 June 2019.

[297] *The African Commission on Human and Peoples' Rights v Republic of Kenya* Application No.006/2012 <www.kenyalaw.org> accessed 8 May 2018.

[298] Ibid Para 3

[299] M Du Plessis & T Maluwa 'The African Union' in J Dugard et al (eds) *Dugard's International Laws A South African Perspective* (2018) 830.

[300] The *Ogieks* case (note 297 above) Para 210.

[301] Ibid.

African Court found that the government had also violated the right to culture of the community as provided for in Articles 17(2) and (3) of the Charter by evicting it from the forest where it undertook cultural activities.[302] The government also violated Article 21 of the Charter by depriving the community the right to enjoy and freely dispose of the abundance of food produced by its ancestral land.[303]

The African Court ruled that the *Ogiek* community had suffered as a result of evictions by the government.[304] Regarding the effects of forced eviction of the community, the African Court stated that:

> …the *Ogieks* had been continuously evicted from the Mau Forest by the government without being effectively consulted. The evictions had adversely impacted on their economic, social and cultural development. The respondents therefore interfered with and violated the right to economic, cultural and social development of the community.[305]

The African Court noted that forced evictions lead to destruction of the community's means of survival, livelihoods, culture, religion and identity which amounts to serious violation of rights as enshrined in Articles 1, 2, 4, 4, 17(2) and (3), 21 and 22 of the African Charter.[306] The African Court ordered the government to halt any form of forced evictions. Additionally, the African Court ordered the government to take measures, in consultation with the community and its representatives, identify, delimit and grant collective land title to the community, assure the community of unhindered use and enjoyment of its land and further compensate the community for losses suffered.[307]

The African Court decision on the case is significant because it enhanced respect for land rights for indigenous peoples in Kenya and Africa at large. It derived the communal right to land from the right to property, contributing to a new regime of protection of land rights which enhances protection of indigenous peoples from forced evictions.[308] The African Court relied on international law to protect the rights of the community as will be discussed in Chapter 3 of this thesis.[309]

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[302] Ibid Para 194.
[303] Ibid Para 201.
[304] Ibid Para 131.
[305] Ibid.
[306] Ibid Para 4.
[307] Ibid Para 5.
[308] R Rosch 'Indigenousness and Peoples' Rights in the African Human Rights System: Situating the *Ogiek* Judgement of the African Court on Human and Peoples' Rights' (2017) 50 (3) *Journal on Self-Determination and Indigenousness* 242.
[309] Section 3.5.3 of Chapter 3.

2.5.1.2 The *Endorois* Community

The *Endorois* is an indigenous pastoralist community estimated to have a population of 45 621 according to the 2019 Kenyan Population Census Report.[310] The community depends mainly on livestock living around Lake Bogoria and Muchongoi forest within the Nakuru county of Kenya where it freely practised its pastoralist culture and religion.[311] The community, in its pastoralist nature, uses Lake Bogoria during the rainy season and Muchongoi forest during the dry seasons.[312]

The community was forcefully evicted from its land as a result of the establishment of the Lake Hannington game reserve (the game reserve) in 1973.[313] The community was not compensated for the loss of its land, did not benefit from the proceeds from the game reserve and was made to settle in areas that were incompatible with its pastoralist way of life, culture and religion.[314] The claim by the community was to recover ownership of its former territories and to seek benefit from the revenues collected from the reserve.

The community sought redress through various court matters which included *William Arap Ngasia & 29 Others on behalf of the Endorois Community v Baringo County Council and Koibatek County Council* and *William Yatich Sitetalia & Others v The County Council of Baringo*.[315] The community filed the cases as a result of sanctions by the government and specifically against Baringo and Koibatek county councils for evicting the community from its land in order to pave the way for national reserves and tourist facilities in the 1970s.[316]

The courts dismissed the application by the community, even though they recognised that the land around Lake Bogoria had been trust land for the community.[317] Despite that recognition, the courts ruled that the community had effectively lost any legal claim as a result of the

[310] The 2019 National Population Census (note 79 above) 423.
[311] Barume (note 223 above) 105.
[312] K Sing'oei 'Disarming the Leviathan: *Endorois* Decision and the Search for Inclusive Social-economic Rights in Kenya' in International Commission of Jurists Kenyan Section *Judicial Enforcement of Social-economic Rights under the New Constitution: Challenges and Opportunities for Kenya* (2011) 312.
[313] United Nations Environmental Programme and Centre for International Environmental Law *Compendium on Human Rights and the Environment* (2004) 52.
[314] Ibid.
[315] *African Commission on Human and Peoples' Rights Communication* 276/2003 (2009) (the *Endorois* decision) <www.achpr.org> accessed 17 April 2018 [Para 2]. The court cases filed in Kenya are Miscellaneous Civil Application No. 214 of 1997 (unreported) and Civil Case No.183 of 2000 (unreported) respectively.
[316] Ibid Para 11.
[317] Ibid.

designation of the land as a game reserve.[318] The courts declined to address the issue of a community's collective right to property by stating that it did not believe Kenyan law should address any special protection to the community's land based on historical occupation and cultural rights.[319]

The community appealed against the decisions made by the High Court but the Kenyan court system denied the community a remedy for violations of its land rights and protection against arbitrary evictions by State actors.[320] Kariuki et al observe that landholding by the county councils was historically characterised by abuse of trust, lack of transparency, political interference in land governance and concentration of land among the powerful and the political elite.[321] The rights of the community on the other hand could not be vindicated by the courts. Sing'oei observes that the conservative nature in handling the matters reduced the utility and relevance of the Kenyan courts as mechanisms for arbitrating complex historical land claims relating to indigenous peoples.[322]

The community, after exhausting local remedies with no redress, presented the case before the ACHPR.[323] The case was filed by the Centre for Minority Rights Development and Minority Rights Group International, on behalf of the community and supported by the Centre on Housing Rights and Evictions as the *amicus curiae*.[324] The complainants alleged violations of rights resulting from eviction of the community from its land without adequate compensation for loss of property and disruption of their indigenous and traditional way of life.[325]

The complainants alleged that the government had violated international law, the African Charter and the Constitution by forcefully evicting the community to pave way for the creation of the Lake Bogoria game reserve and other tourist facilities.[326] The complainants

[318] Ibid.
[319] Ibid.
[320] Sing'oei (note 312 above) 323-324
[321] Kariuki et al (note 2 above) 202.
[322] Sing'oei (note 312 above) 324.
[323] The *Endorois* case (note 315 above). The African Commission on Human and Peoples' Rights is an institution of the African Union established under Articles 5(e) and 20 of the *Constitutive Act of the African Union* and created under Article 30 of the *African Charter of Human and Peoples' Rights* (adopted 27th June 1981, OAU Doc. CAB/LEG/67/3 rev 5, 21 I.L.M.58) <www.achpr.org/instruments/achpr> accessed 31 January 2018. The African Commission has been established as a quasi-judicial body whose mandate is to promote and protect human rights.
[324] Ibid Para 1.
[325] Ibid.
[326] Ibid Para 2.

claimed that the community had lived in the Lake Bogoria area and practised a way of life linked to the land before the creation of the Lake Hannington game reserve in 1973 and subsequent gazettement of the Lake Bogoria game reserve in 1978 by the government.[327] The complainants also alleged that creation of game reserves denied the community access to the area and jeopardised the community's cultural integrity and pastoral enterprise.[328] The complainants further claimed that 30 years after the evictions began; the community had not been compensated for the loss of its land and rights associated with land.[329]

The government argued that creation of the game reserves on the land inhabited by the community had been preceded by re-settlement exercise, culminating in the resettlement of the majority of the community in the Mochongoi settlement scheme.[330] The government also disputed that the community was indeed a community on its own and argued that the complainants bore the burden of proving that the community was distinct from the larger Kalenjin tribe before it could proceed to make a case before the ACHPR.[331] The government argued that the community could not identify itself as an indigenous community.

The government further argued that most tribes did not reside in their ancestral lands owing to movements in search for pastures and arable land for agriculture.[332] The government further argued that the relocation of the community by the government was aimed at facilitating development and creation of irrigation schemes, national parks, game reserves, forests and extraction of natural resources, such as minerals.[333] The government stated that it had already instituted programmes for universal free primary education, agricultural recovery and economic recovery strategy for poverty eradication among the poor and marginalised communities.[334]

The ACHPR had the opportunity to interrogate the meaning of the rights to religion, culture, development, property, and natural resources as provided for in the Charter and applied them to the *Endorois* as an indigenous community.[335] Land rights for the community was central to the case since the complainants sought for restitution of its land with the title and clear

[327] Ibid Para 3.
[328] Ibid Para 19.
[329] Ibid.
[330] Ibid Para 143.
[331] Ibid Para 142.
[332] Ibid Para 138.
[333] Ibid.
[334] Ibid Para 139.
[335] Sing'oei (note 312 above) 325-335.

demarcation.[336] The ACHPR found that the land surrounding Lake Bogoria comprised the traditional land of the community and the community had the right to property with respect to the land, the animals and the possessions attached to the land.[337] The ACHPR observed that there was neither effective participation by the community nor an environmental impact assessment prior to conversion of the land into a wildlife reserve.[338]

The ACHPR observed that evictions by the government on the community violated Article 14 of the Charter on the right to property.[339] The ACHPR found that denial of access to its ancestral land amounted to a violation of the Kenyan law and the provisions of the Charter that related to land rights.[340] The land occupied by the community was considered as trust land by the legal framework then and was supposed to be held in trust for the community by the county councils for the benefit of the traditional occupants.[341] The observation by the ACHPR demonstrates that lack of legal protection of the notion of property of indigenous people under Kenyan law was to blame for the abuse of the land rights of the community.

The ACHPR recommended that the government should recognise the right of ownership to land for the community, restitution of its ancestral land, facilitate unrestricted access to Lake Bogoria and surrounding sites for religious and cultural rites and pay adequate compensation to the community for the loss suffered.[342] The ACHPR also recommended that the government should pay royalties to the community from existing economic activities and ensure that its members benefit from employment possibilities within the game reserve.[343] The ACHPR also relied on international law to protect the rights of the community as will be discussed in Chapter 3 of this thesis.[344]

Kibugi observes that the decision of the ACHPR in the *Endorois* case was not an actual judgement, but a recommendation made to the government.[345] Kibugi further observes that the government has not recognised land rights of indigenous peoples and the Kenyan courts

[336] The *Endorois* case (note 315 above) Para 22.
[337] Ibid Para 184.
[338] Ibid Para 228.
[339] Ibid.
[340] Ibid Paras 209, 213 & 228.
[341] Ibid Paras 103-108. The applicable law then was the Constitution of Kenya 1969 and Section 2 of the Trust Land Act Cap 288 Laws of Kenya (both repealed).
[342] Ibid 298 (1) c.
[343] Ibid 298 (1) d.
[344] Section 3.5.2 of Chapter 3.
[345] R Kibugi *Local communities' and Indigenous Peoples' Land and Forestry Rights: Assessing the Law and Practice on Tenure Security in Kenya* (2021) 25.

of law are unwilling to take on the task to formally shift land rights from public status to recognition of land rights for indigenous communities as guided by the ACHPR.[346]

The *Endorois* case is significant because it recognised indigenous peoples' collective rights over ancestral land. The case sets an important precedent that can protect indigenous peoples against the forced acquisition of their land by State agencies.[347] The case has the potential to enhance vindication of land rights of indigenous peoples who have been illegally forced from their homes or face eviction from their ancestral land by governments.[348] The case also provided an ideal opportunity to clarify group rights as provided in the Charter and further accelerated the ACHPR's standard setting processes on indigenous peoples' rights in tandem with international developments.[349]

The following section discusses forced evictions affecting other communities which are not regarded as indigenous. The study considers the *Mijikenda* communities and its sub-tribes living at the coast of Kenya. The section discusses the status, historical circumstances that brought about the community's current situation and the questions and approaches that have been taken by the Crown and the subsequent governments to the present day.

2.6 Forced Evictions of other Communities

2.6.1 The *Mijikenda* Community of the Kenyan Coast

Communities in Kenya that are not identified as indigenous have also been affected by forced evictions. The most prevalent cases are found within the coastal parts of Kenya. The *Mijikenda* community (the community) is the dominant community in the coastal part of Kenya. The community consists of nine related Bantu ethnic groups namely *Chonyi, Kambe, Duruma, Kauma, Ribe, Rabai, Jibana, Giriama* and *Digo* spread across Mombasa, Kilifi and Kwale counties.[350]

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[346] Ibid.

[347] L Claridge *Landmark Ruling Provides Major Victory to Kenya's Indigenous Endorois Centre for Minority Rights Development & Minority Rights Group International (MRG) on behalf of the Endorois Community v The Republic of Kenya* < https://www.refworld.org> accessed 30 April 2020 [6].

[348] Ibid.

[349] K Sing'oei & J Shepherd 'In Land We Trust': The Endorois' Communication and the Quest in Land We Trust': The Endorois' Communication and the Quest for Indigenous Peoples' Rights in Africa' 16 *Buffalo Human Rights Law Review* (2010) 59-60.

[350] The 2019 Population Census Report (note 79 above) 423 gives the total number of the *Mijikenda* community as 2,488,691. The sub-tribe with the greatest number is the *Giriama* with 1,007,653 and the sub-tribe with the smallest number is *Ribe* with 10,690.

The acquisition of the large tracts of land at the coast by the colonial and subsequent governments left the community landless.[351] The alienation of land at the coast affecting the community had begun during the slave trade by the Arabs even before colonisation by the Crown. Subsequently, the Crown signed agreements with the Sultan of Zanzibar over the ten mile coastal strip upon arrival at the coast.[352] The ten mile coastal strip comprises land extending from the mouth of the Ruvuma River in Tanzania to the delta of the Tana River in Kenya and spreading to a distance of ten miles from the high water mark into the interior and resulted from the Anglo-German agreement of 1886.[353]

The Crown did not annex the miles coastal strip because it could result in international conflict because of the various treaties that the Sultan of Zanzibar had entered with various powers guaranteeing their sovereignty and control over her coastal dominions.[354] The Crown designated all the other land apart from the ten miles coastal strip as the colony of Kenya.[355] After independence, the Arabs within the coastal strip rejected to be incorporated in independent Kenya and wanted to secede to be part of Zanzibar. The Kenyan Government signed an agreement with the government of Zanzibar guaranteeing land ownership to sultans' subjects at the expense of Kenyan inhabitants whose land had been alienated.[356]

The community continues to have rightful claims over certain sacred sites within the former ten mile coastal strip, but have no title deeds to support their traditional claims and consequently, tourist hotels and cottages have been built on some of these sacred places.[357] The colonial and subsequent governments recognised land claims by the subjects of the Sultan, some with ancestral links outside Kenya. The subjects were allowed to register land and acquire title deeds but the community could not register the land they had lived in for generations.[358]

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[351] Kenya Human Rights Commission *Redress for Historical Land Injustices in Kenya: A Brief on Proposed Legislation for Historical Land Injustices* (2016) < https://www.khrc.or.ke/publications> accessed 20 October 2022 [7].

[352] Kanyinga (note 106 above) 34.

[353] J Mwaruvie 'The Ten Miles Coastal strip: An Examination of the Intricate Nature of Land Question at Kenyan Coast' (2011) 1 (20) *International Journal of Humanities and Social Science* 176.

[354] Ibid.

[355] Ibid.

[356] Ibid 177.

[357] Ibid 181.

[358] T Ojienda *Land Law and Conveyancing: Principles and Practice* (2015) 13.

The land question within the coast region affecting the community is peculiar due to historical and legal origins.[359] Land was alienated from the community by the colonial and subsequent governments through legal processes of land adjudication and registration of titles.[360] In the process, the community was deprived of its land which resulted in large segments of the affected communities living as informal occupants.[361]

The community was evicted from its lands at the height of political conflicts between the coastal communities and Arabs after independence in 1963.[362] The problem was also escalated by absentee landowners who held formal titles. The implication of absentee landowners was twofold. Firstly, it precluded the community from both use and land control rights and reduced the amount of public land on which the landless could be settled.[363] Secondly, the land rights of the community were made fragile and it resulted in mass evictions.[364] The same phenomenon happened to other communities at the coastal parts and in other parts of the country.[365]

Land appropriation to support the colonial administration at the coast created a people without land rights because of alienation, imposed English Property law and tenure and transformed customary land law and tenure.[366] The Land Titles Ordinance of 1908 (the Ordinance) which subsequently became the Land Titles Act (LTA)[367] in particular was instrumental in alienation of land that belonged to the coastal communities during the colonial and post-colonial periods. The legislation was repealed in 2012 but its consequences are still being felt.

The Ordinance distinguished private land from Crown land situated within the ten mile coastal strip.[368] The Ordinance provided for guidelines for application of title by claimants.

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[359] Kanyinga (note 106 above) 45.
[360] Ibid 3-6.
[361] Ibid.
[362] K Kanyinga (note 106 above) 70-71.
[363] Ibid.
[364] Ibid.
[365] P Ochieng 'Communal Land Tenure and Property Rights in Tana River County: A Case of Complex Clan Power Dynamics and Dispossession' in C Odote & PK Mbote (eds) *Breaking the Mould, Lessons For Implementing Community Land Rights in Kenya* (2016) 71
[366] K Kanyinga *Struggles of Access to Land: The 'Squatter Question' in Coastal Kenya* (1998) <http://erepository.uonbi.ac.ke> accessed 28 August 2019 [34].
[367] Cap 282 Laws of Kenya (now repealed) by the Land Registration Act 3 of 2012.
[368] Section 15 of the Land Title Ordinance of 1908 provided for the requirement that people residing on land in the protectorate to apply for a certificate of ownership or in the default to lose possession of the land. Section 16 (2) provided that all land for which no certificate of ownership is issued is deemed to be government land.

The certificate of ownership was conclusive evidence of ownership of land as provided in Section 21 of the Ordinance as follows:

> …save as in this Act otherwise expressly provided, every certificate of title duly authenticated under the hand and seal of the Recorder of Titles shall be conclusive evidence against all persons (including the Government) of the several matters therein contained, and a certificate of ownership shall be conclusive proof that the person to whom the certificate is granted is the owner of the coconut trees, houses and buildings on the land in respect of which the certificate is granted, at the date of the certificate, unless there is noted thereon in manner hereinafter provided a memorandum to the contrary effect.

The Ordinance subordinated the land rights of the native coastal communities that owned and held land on customary land tenure. The Ordinance and subsequent legislation were enacted without the knowledge of the coastal communities and trashed the land rights of the communities that owned the land on community tenure system.[369] Kanyinga has succinctly elaborated on the impact of the Ordinance on the land rights of the community and stated that:

> …this Ordinance, and its version of land tenure on the coast, began by altering the distribution of land, first, among the Arabs and the Swahili. The communal rights and claims of some members of these groups were denied registration and their land instead turned over to the Crown. The Ordinance then closed avenues via which the Mijikenda and ex-slaves could have made any claim to land in the coastal belt: it "cut off" Mijikenda legal rights to land in the fertile coastal belt. Larger but less fertile and more arid reserves were set aside for them in the hinterland away from claims of the Arabs and Swahili, Indians and Europeans. This left behind large tracts of land for expropriation for the settlers and supposedly pre-empted conflicts (over land) between the Mijikenda and other groups. [370]

The Ordinance was used by the Crown to close any avenues in which the community could claim rights on their land because it only enabled the subjects of the Sultan who were Arabs and Swahili Muslims to register land as private property. Successful claimants were issued with certificates of ownership for freehold interest over the land.[371] Land registration and issuance of titles under the LTA allowed the community to continue living on lands that it traditionally owned without knowledge that there existed other claimants with formal titles to the same lands.[372] Syagga observes that lack of information and verifiable evidence among the Africans at the coast, particularly within the ten mile coastal strip were dispossessed and

[369] Ochieng (note 365 above) 71-72.

[370] Ibid. Tana River County is part of the coast of Kenya. The Land Titles Ordinance of 1908 which later became the Land Titles Act trashed the land rights of native communities and came into effect without knowledge of the communities. The effect was that many people remained as users of land without formal ownership.

[371] T Ojienda & M Okoth, 'Land and the Environment' in PLO Lumumba, MK Mbondenyi & SO Odero (eds) *The Constitution of Kenya: Contemporary Readings* (2011) 160.

[372] Kanyinga (note 366 above) 10-11.

continued to live as tenants at the will of those who made successful claims to land and registered freehold titles without their knowledge.[373]

The creation of private land rights without consultation and without considering compatibility of the land uses with the broader interest of the community has continued to affect the community to date. The community is vulnerable to evictions to date. The land question at the coast and particularly the problem of evictions of the community from its land was not resolved after independence and the post-independent regimes have alienated more land from the affected communities for the benefit of the political elite and politically privileged communities.[374] Significantly, the community has attempted to seek reliefs from the court for wrongfully alienation of its land and eviction by virtue of the Ordinance and the LTA.

2.6.1.2 Federation of Women Lawyers (FIDA Kenya) & 4 Others v Attorney General as Representing Commissioner of Lands & 2 Others

The FIDA Kenya case[375] concerned petitioners who were members of the Giriama community (the community) residing in Kilifi county. They claimed communal interest on the suit property identified as land parcel number 1427. They filed the petition on their behalf and on behalf of other members of the community which is a sub-tribe of the larger Mijikenda people.[376] They sought a declaration from the Environment and Land Court (ELC) that the process and award of the certificate of title to Sheik El Mazrui for the property was unconstitutional and a judicial review order quashing all deeds, agreements, and assignments relating to the certificate of title to the property.[377]

The petitioners further sought a declaration that the provisions of the Land Titles Ordinance (the Ordinance) of 1908 were inconsistent with international law, and violated the 1969 and 2010 Constitutions.[378] They based their claim on the fact that the community settled at the coast in the 16th century having migrated from Shungwaya, a location north of Lamu county

[373] P Syagga *Public land, Historical Land Injustices and the New Constitution* (2012) 8.
[374] Republic of Kenya *Report of the Truth Justice and Reconciliation Commission* (2013) 13.
[375] (2016) eKLR.
[376] Ibid Para 1.
[377] Ibid Para 1 & 2.
[378] Ibid Para 2. The petitioners argued that the alienation of their ancestral land by virtue of Sections 2 and 15(1) of the Land Titles Ordinance were inconsistent with Article 8, 9, 13 and 14 of the European Convention on Human Rights (ECHR) and Article 1 of Protocol 1 of the ECHR. They also wanted the ELC to declare that the existence of the Certificate of Title that was issued in respect of the property was contrary to the Constitutions of Kenya, both the 1969 Constitution and the current 2010 Constitution.

within the coastal region of Kenya.[379] The petitioners provided evidence of the land register which showed that registration of title was first effected in 1911 in favour of the heirs of Sheik El Mazrui, though the petitioners argued that despite issuance of title, the community continued residing in the parcel of land.[380]

The petitioners argued that the requirement by the Ordinance, which required people residing on land in the protectorate to apply for a certificate of ownership or in default, to lose possession of the land to those who had applied, violated the natural rights of their ancestors.[381] The petitioners also argued that the Ordinance was designed to deprive the community of their natural rights to land and occasioned the community to suffer displacement from its ancestral land.[382]

The respondents argued that the disputed land was private land and that the petitioners had not provided evidence to demonstrate that they were acting on behalf of the members of the community.[383] They stated that the suit property had always been privately owned and the registered proprietors had not been enjoined in the case.[384] They further stated that during subdivision of the land, people living as informal settlers/squatters on the land were issued with title documents for the parcels they resided on.[385]

The ELC dismissed the petition on the basis that existing legislation at the time of alienation of the land was duly adhered to. The ELC argued that at the time of colonisation, a new system of land administration was established by the Crown which extinguished the ancestral rights of the petitioners.[386] The ELC directed that the land rights of the petitioners should be directed to the government which bears the obligation to implement settlement programmes that are aimed at providing the citizens with land and shelter as stipulated in Section 134 of the Land Act.[387]

The *FIDA Kenya* case demonstrates the complexity of the land question at the coast and attempts by the community to seek redress from the court. The community still feels that its

[379] Ibid Para 4.
[380] Ibid Para 54.
[381] Ibid Para 9.
[382] Ibid Para 10.
[383] Ibid Para 32.
[384] Ibid Paras 33 & 51.
[385] Ibid Para 39.
[386] Ibid Paras 84 & 85.
[387] Ibid Para 87.

land rights have not been vindicated from the time of pre-colonisation, the colonisation period to the present day. The case demonstrates how the Crown accepted the status quo and how post-colonial regimes have ignored the land rights of the community. The case further demonstrates how the few Arabs hold freehold title deeds for land traditionally belonging to the community, thereby escalating the problem of informal occupation of land and placing the community vulnerable to evictions.

2.7 Conclusion

The discussion in this chapter can be summarised into three broad categories. Firstly, the meaning of forced evictions, secondly, the theoretical underpinnings for protection against forced evictions and thirdly, the prevalence of forced evictions in Kenya. The chapter established that forced evictions is a global phenomenon and is carried out in developing countries, Kenya being among them. The chapter established that interdependence of rights is a key theoretical underpinning to protection from forced evictions which affect other rights, both political and SERs. It is apparent that forced evictions have adverse effects on the people, both physical and psychological and a negative impact on human dignity.

Insecure land rights and conflicts in land rights have also been used by state and non-state agents to justify forced evictions for indigenous peoples and other communities. The chapter further established that forced evictions are justified in the name of development and promotion of the public benefit of land for occupants within the informal settlements.

The chapter demonstrated the prevalence of forced evictions affecting people living within informal settlements in urban areas, indigenous peoples and other communities not regarded as indigenous. The chapter selected the case studies of informal settlements within urban areas, *Ogiek*, *Endorois* and *Mijikenda* communities to demonstrate the prevalence in the issue of forced evictions. The chapter demonstrated that lack of formal titles by the select case studies to the land they occupy is a contributing factor to the problem of forced evictions.

The chapter interrogated land tenure as a critical theme. It further interrogated land tenure issues in respect of security of tenure within urban and rural settings and analysed cases regarding communities affected by forced evictions. The chapter established that insecurity of tenure is a major cause of forced evictions. Both urban and rural land tenure has not protected communities adequately against forced evictions. The case law in Kenya has established that there is a gap in law policy as far as protection from forced evictions is concerned.

The following chapter addresses the international legal framework for protection against forced evictions. The discussion is aimed at putting the aspect of forced evictions in the international context in order to pave the way for the role of law and policy in protection against it in the subsequent chapters.

The chapter reviews international conventions and regional conventions and bodies and courts which provide for the obligations of States to protect individuals and communities from forced evictions. The chapter discusses forced evictions jurisprudence by regional bodies. The chapter is essential in demonstrating that international law contains norms that can be infused in the Kenyan legal framework to curb forced evictions and where such evictions are inevitable, they are carried out according to the applicable international best practices.

CHAPTER 3:
INTERNATIONAL LEGAL FRAMEWORK FOR PROTECTION AGAINST FORCED EVICTIONS

3.1 Introduction

The idea of human rights has in the recent past gained a great deal of ground and official status in international discourse with many international bodies and committees addressing concerns about human rights violations in different parts of the world.[1] In light of the foregoing, forced evictions and ensuring the right to housing for people have become a global challenge.[2] The role of the international legal framework cannot be understated since it has contributed to the development of legislation and jurisprudence on the nature of States obligations in protection against forced evictions.[3]

This chapter aims at contributing to the development of a legal and policy framework in Kenya that will curb forced evictions, or one that ensures that where such evictions are inevitable, they are conducted in accordance with the acceptable international best practices. It is therefore imperative to consider international best practices and norms that have been developed by States over time. The Kenyan State is bound by international law norms which it should not contravene.[4] Intentional violation of international law by States is detrimental to the international legal system and international public policy.[5] Kenya is also bound by customary international law and international treaties of a human rights character, both at the African and international levels.

This chapter discusses the international legal framework for protection from forced evictions that can be infused in the Kenyan legal framework. The discussion is aimed at putting the

[1] A Sen *Development as Freedom* (1999) 227.

[2] L Chenwi 'Implementation of Housing Rights in South Africa: Approaches and Strategies' (2015) 24 *Journal of Law and Social Policy* 68.

[3] Ibid 76. According to Chenwi, South African courts have given due weight to relevant international law in the enforcement of housing rights and the role of international law in implementation of the right to housing has been recognised in the Constitution.

[4] *International Commission of Jurists-Kenya v Attorney General & 2 others* (2011) eKLR. The case concerned the application of international law principles in accordance with Article 2(5) of the Constitution. The application was made by the Kenyan Section of the International Commission of Jurists to obtain orders to the effect for a warrant of arrest against President Omar Al-Bashir of Sudan. The Court issued the warrant of arrest on account of crimes committed under the Rome Statute that establishes the International Criminal Court. In granting the warrants, the court acknowledged that the Rome Statute forms part of the law of Kenya hence the Constitution incorporates it in the courts of Kenya.

[5] PLO Lumumba & L Franceschi *The Constitution of Kenya 2010: An Introductory Commentary* (2014) 72. Beyond customary international law, Kenya is also bound by international treaties of a human rights character, both at the African and international levels.

aspect of forced evictions in the international context. Evaluation of the human rights issues and practices provided in international law in respect of land rights and forced evictions can provide guidance in addressing the evictions problem in Kenya.

International legal instruments and jurisprudence influence legislation domestically and are also relied upon by national courts in making their decisions.[6] Liebenberg observes that legislation that affects people's socio-economic rights (SERs) should be interpreted in conformity and adherence to applicable international law.[7] Liebenberg further observes that application of international law standards provides additional impetus for the courts to interpret social and economic legislation in ways that take into account widely accepted international normative values.[8] International best practices have also contributed to enhanced protection of fundamental rights and freedoms of the individual.[9]

The chapter is arranged as follows; Section 3.2 evaluates the status of international law in the Kenyan Constitution. Section 3.3 reviews the International Covenant on Social Economic and Cultural Rights (ICESCR)[10] and its relevance in protection of the right to housing and protection from forced evictions. The Section further analyses the provisions of the General Comments by the Committee on Economic Social and Cultural Rights (CESCR) particularly on the right to housing and protection from forced evictions.

Section 3.4 evaluates thematic instruments which include the Convention on the Elimination of all Forms of Discrimination against Women (CEDAW),[11] and the Convention on the Rights of Persons with Disabilities (CRPD).[12] Section 3.5 evaluates the contribution made by the African Charter on Human and Peoples' Rights[13] and the bodies established thereof such

[6] Ibid 129. The authors state that the application of the Bill of Rights in the Constitution of Kenya is the same as what is provided in most international instruments that deal with human rights such as the UDHR, ICCPR, ICESCR and the African Charter on Human and Peoples' Rights among others.

[7] S Liebenberg *Socio-Economic Rights Adjudication under a Transformative Constitution* (2010) 105.

[8] Ibid.

[9] E Gonzalez 'A Distinct Path towards Social Justice' in M Langford (ed) *Social Rights Jurisprudence: Emerging Trends in International and Comparative Law* (2009) 198. According to the author, international law plays an increasingly relevant role in national human rights jurisprudence.

[10] International Covenant on Economic, Social and Cultural Rights (1966) UN Doc A/6316.

[11] Convention on the Elimination of all Forms of Discrimination against Women (1979) UN Doc A/34/46.

[12] International Convention on the Protection and Promotion of the Rights of Persons with Disabilities (2006) UN Doc A/61/49

[13] African Charter on Human and Peoples' Rights adopted on 27 June 1981 OAU Doc CAB/LEG/67/3 Rev 5, 21 I.L.M 58 (1982).

as the African Commission on and Human and Peoples' Rights (ACHPR)[14] and the African Court on Human and Peoples' Rights (the African Court).[15] It discusses indigenous peoples' jurisprudence by the ACHPR and African Court.

The chapter recognises that international, thematic and regional instruments and jurisprudence developed by regional institutions have principles worth incorporating into the Kenyan legal framework to protect the right to housing and protect against forced evictions. It is also important in assisting Kenyan courts by providing guidance on the nature, scope and content of protection from forced evictions. Since application of international law depends on the constitutional system of a particular State, it is important to interrogate the status of international law in the Kenyan legal framework. The subsequent part discusses the status of international law under the Constitution and legislation in Kenya.

3.2 The Status of International Law under the Kenyan Constitution

In order to underscore the application of international legal instruments in Kenya, it is imperative to understand the status of international law under the Constitution of Kenya (the Constitution).[16] International law has an implication on the Kenyan domestic legal system in respect of protection from forced evictions and the obligations relating to the right to housing. Kenya is also a signatory to a number of treaties which include the African human rights instruments and the UN human rights instruments.[17]

The Constitution has incorporated international law by virtue of Article 2(5) and (6) and therefore, international law forms part of the Kenyan legal system.[18] Articles 2(5) and (6) lay the basis for protection from forced evictions in international law. The Constitution provides for the right to housing as an important component of protection from forced evictions in the

[14] The ACHPR is established under Article 30 of the African Charter with the mandate of promotion and protection of human rights in Africa. It was officially inaugurated on 2 November 1987.

[15] African Union 'Protocol to the African Charter on Human and Peoples' Rights on the Establishment of an African Court of Human and Peoples' Rights' (2004) OAU Doc OAU/LEG/EXP/AFCHPR PROT (III) <www.acphr.org> accessed 1 February 2020.

[16] Republic of Kenya *The Constitution of Kenya* (2010).

[17] Relevant to this study, Kenya has ratified a number of international legal instruments which include the International Covenant on Economic, Social and Cultural Rights on 1 May 1972, the Convention on the Elimination of All Forms of Discrimination Against Women on 21 February 1997 and the International Convention on the Protection and Promotion of the Rights of Persons with Disabilities on 30 March 2007 among other international instruments. Kenya also ratified the African Charter on Human and Peoples' Rights on 23 January 1992. The essence of ratification is the creation of legal relations between Kenya and other States Parties to the particular treaty. More significantly, ratification binds the State at the domestic level.

[18] Article 2(5) of the Constitution provides that 'the general rules of international law shall form part of the law of Kenya' and Article 2(6) provides that 'any treaty or convention ratified by Kenya shall form part of the law of Kenya under the Constitution.'

Bill of Rights.[19] The right to housing as protected in international law instruments will be discussed subsequently in this chapter.

By providing that the general rules of international law shall form part of the law, Article 2(5) envisages direct and automatic application of the general rules of international law without enactment of legislation. However, the Constitution omits customary international law from the sources of law. Mavedzenge observes that the meaning of the Article 2(5) is ambiguous as to the application of customary international law and whether it takes precedence over domestic statutes.[20] However, in a contrary view, Oduor posits that the intention of the drafters of the Constitution was to use the phrase 'general rules of international law' in a manner that seemingly incorporates customary international law.[21] Mbondenyi and Ambani concur with Oduor by observing that the general rules of international law which may have acquired the force of law in Kenya include principles of sovereign equality of States, customary international law and territorial integrity, among others.[22]

Article 2(6) of the Constitution provides that ratified treaties and conventions ratified shall form part of the law. The enabling legislation that regulates the ratification of international agreements is the Treaty Making and Ratification Act (TMRA).[23] TMRA gives effect to the provision of Article 2(6) by providing for the procedures of making and ratification of treaties. TMRA provides that where the government intends to ratify a treaty, the Cabinet Secretary of the relevant state department in consultation with the Attorney General shall submit it for discussion in cabinet.[24] The treaty is thereafter submitted to the national assembly for its ratification.[25] The national assembly may approve or decline to approve the ratification of the treaty. The national assembly shall decline to ratify a treaty whose

[19] Article 21 of the Constitution provides that 'it is a fundamental duty of the State and every State organ to observe, respect, protect, promote and fulfil the rights and fundamental freedoms in the Bill of Rights and the State obligated to take legislative, policy and other measures, including the setting of standards, to achieve the progressive realisation of the rights guaranteed under Article 43 which include the right to housing.'

[20] A Mavedzenge 'Comparing the Role of International Law in South Africa and Kenya' (2013) 1 *Cornel International Journal Law Journal Online* 100.

[21] M Oduor 'The Status of International Law in Kenya' (2014) 2(2) *Africa Nazarene University Law Journal* 98.

[22] M Mbondenyi & J Ambani *The New Constitutional Law of Kenya: Principles, Government and Human Rights* (2012) 24.

[23] Act 45 of 2012.

[24] Ibid Section 7.

[25] Ibid Section 8-12.

provisions are unconstitutional or reservation to treaties that negates any provision of the Constitution.[26]

The Constitution is generally receptive to international norms since it recognises that the general rules of international law, ratified treaties and conventions form part of the law.[27] Kenya is monist in application of international legal instruments in her domestic law.[28] Franceschi and Lumumba observe that ratified treaties are part of Kenyan law under the Constitution and need no further legislation by parliament even when the treaties are subjected to parliamentary approval before ratification.[29] In monist legal systems, once treaties have been ratified and published externally, they become law of the land automatically without need for legislative action.[30]

In dualist legal systems, treaties, rules and principles of international law must be expressly and specifically transformed into domestic law through legislative action.[31] Within dualist legal systems, parliaments are required to enact statutory law before giving internal effect to the treaties. Franceschi observes that dualism hampers the fulfilment of international obligations because international law does not automatically become a source of authoritative law, and thus not automatically absorbed into domestic law.[32] It is not possible to give internal effects to treaties unless they are consistent with statutes enacted by parliament or with any other existing legislation.

Mavedzenge observes that the difference between the Kenyan and South African systems on application of international legal instruments is the requirement for domestication and the treatment of customary international law.[33] Mavedzenge states that the Kenyan Constitution

[26] Ibid Section 8 (9).

[27] Articles 2(5) and (6) of the Constitution.

[28] L Franceschi 'Constitutional Regulation of International Law in Kenya' in PLO Lumumba, MK Mbondenyi and SO Odero (eds), *The Constitution of Kenya: Contemporary Readings* (2011) 275; *Beatrice Wanjiku & Another v Attorney General & Another* (2012) eKLR. In Para 17, the Court observed that before the promulgation of the Constitution in 2010, Kenya took a dualist approach to the application of international law but has since indicated migrated from the dualist dispensation to the monist dispensation. The position was also emphasised by Koome J in *Re Zipporah Wambui Mathara* (bankruptcy cause) (2010) eKLR, where she stated that by virtue of Section 2(6) of the Constitution of Kenya 2010, international treaties**,** and conventions that Kenya has ratified, are imported as part of the sources of the Kenyan law.

[29] Lumumba & Franceschi (note 5 above) 76-77.

[30] Mbondenyi & Ambani (note 22 above) 26.

[31] Ibid 24.

[32] Franceschi (note 28 above) 233- 245

[33] Mavedzenge (note 20 above) 100.

requires only ratification for an international agreement to have domestic application.[34] Even though the Constitution does not define ratification, TMRA defines ratification as the international act of acceptance, approval and accession by which the State accepts to be bound by a treaty.[35] The monist nature of the Constitution makes Kenya receptive to international obligations contained in international law instruments.

The following section discusses the ICESCR, an instrument which has made significant contributions towards protection from forced evictions.

3.3. The International Covenant on Economic, Social and Cultural Rights (ICESCR)

3.3.1 Protection from Forced Evictions under the ICESCR

The ICESCR[36] is a principal human rights treaty adopted in 1966 and came into force in 1976. Kenya is a State party to the ICESCR.[37] Kenya, as a State party is obligated to recognise the human right to adequate housing which is derived from the right of everyone to an adequate standard of living. The ICESCR codifies socio-economic rights (SERs) which include the right to housing. The ICESCR provides for the right to housing by stating that:

> …the States Parties to ICESCR recognise the right of everyone to an adequate standard of living for himself and his family, including adequate food, clothing and housing, and to the continuous improvement of living conditions. The States Parties will take appropriate steps to ensure the realisation of this right, recognising to this effect the essential importance of international cooperation based on free consent.[38]

The provision in Article 11 includes the right to adequate standards of living. The right to housing entails protection of people from the negative effects caused by homelessness on livelihoods and well-being.[39] Protection from arbitrary evictions that lead to homelessness is an important component of the right to housing. Chenwi observes that the implementation of the right to housing is vital to enjoyment of human rights, improved well-being and better livelihoods.[40]

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[34] Ibid.
[35] TMRA (note 23 above) Section 2.
[36] The ICESCR (note 11 above).
[37] Kenya acceded to the ICESCR on 1 May 1972. See Kenyan Treaties Online < treaties.mfa.go.ke/treaties> accessed 10 December 2021.
[38] The ICESCR (note 11 above) Article 11 (1).
[39] L Chenwi 'Implementation of Housing Rights in South Africa: Approaches and Strategies' (2015) 24 *Journal of Law and Social Policy* 68-69.
[40] Ibid.

The right to housing is limited by the reason that it is only available to the extent of available resources the State permits. The CESCR in General Comment No. 3[41] requires States to take steps to the maximum of their available resources in order to achieve full realisation of a right.[42] However, the CESCR does not unnecessarily obligate States to do the impractical even though it has stated that some of the obligations are supposed to be of immediate effect.[43] The CESCR provides that even though States experience constraints due to the limits of available resources, progressive realisation of SERs should be implemented reasonably and without discrimination.[44] The CESCR in General Comment No 3 further provides that State parties where significant numbers of individuals are deprived of housing among other rights, fail in their obligations under the ICESCR.[45]

The CESCR defines progressive realisation as a concept that recognises that full realisation of all SERs may not be achieved in a short period of time.[46] The fact that the realisation of the right to housing can only be achieved progressively does not affect the obligation of States under the ICESCR. States are obligated to take steps within their power as soon as possible to ensure realisation of the right to housing among other SERs. The CESCR elaborates this fact by stating that:

> … the fact that realisation over time, or in other words progressively, is foreseen under ICESCR should not be misinterpreted as depriving the obligation of all meaningful content. It is on the one hand a necessary flexibility device, reflecting the realities of the real world and the difficulties involved for any country in ensuring full realisation of SERs.[47]

The right to housing as a legal right is subject to effective remedies.[48] The CESCR has stated that for a State to meet this obligation, it must demonstrate that, in aggregate, the measures being taken are sufficient to realise the right for every individual in the shortest possible time in accordance with the maximum available resources.[49] States are further obligated to take

[41] UN CESCR General Comment No 3 'The Nature of States Parties' Obligations' 14 December 1990 UN Doc. E/1991/23.
[42] Ibid Paras 9, 10 & 13.
[43] C Mbazira 'A Path to Realising Economic, Social and Cultural Rights in Africa? A Critique of the New Partnership for Africa's Development (2004) 4 *African Human Rights Law Journal* 38.
[44] General Comment No 3 (note 41 above) Para 1.
[45] Ibid Para 10.
[46] Ibid Para 9.
[47] Ibid.
[48] Ibid Para 1.
[49] UNGA 'Report of the Special Rapporteur on Adequate Housing as a Component of the Right to an Adequate Standard of Living, and on the Right to Non-discrimination in this context' (2018) UN Doc A/HRC/37/53 Para 20.

deliberate, concrete and targeted measures to implement and fulfil the right to housing by allocation of the maximum available resources[50]

The provisions in the ICESCR sets out protection against forced evictions and also safeguards the right to housing which is a bulwark against arbitrary evictions. The right housing becomes relevant within the context of forced evictions.[51] The themes of security of tenure and protection from forced evictions are fully discussed below as elaborated in General Comments 4 and 7.

The CESCR General Comment No. 4[52] provides parameters for adequate housing to include affordability, non-discrimination and cultural sustainability. The General Comment was adopted pursuant to Article 11 of the ICESCR which recognises the right to adequate standard of living for everyone including the right to adequate housing. The General Comment provides that the human right to adequate housing is central to the enjoyment of all SERs.[53] The CESCR indicates that Article 11(1) of the ICESCR remains the most comprehensive provision on the right to adequate housing and the most important provision on the right as contained in international human rights instruments.[54]

The CESCR derives the right to housing from the provision of the right to adequate standard of living in the ICESCR. The CESCR captures the essence of the right to housing by stating that:

> …pursuant to Article 11(1) of the ICESCR, State parties recognise the right of everyone to adequate standard of living for himself and the family, including adequate food, clothing and housing, and to continuous improvement of living conditions. The human right to adequate housing, which is thus derived from the right to an adequate standard of living, is of central importance for the enjoyment of all SERs.[55]

The General Comment is important since it stipulates the minimum content which States are supposed to put in place in order to achieve the right to housing. It includes effective monitoring of the situation in respect of access to housing and putting into place laws,

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[50] Ibid.

[51] L Juma 'Nothing but a Mass of Debris: Urban Evictions and the Right of Access to Adequate Housing in Kenya' (2012) 12 (2) *African Human Rights Law Journal* 479.

[52] UN CESCR General Comment No. 4 'The Right to Adequate Housing' (1991) UN Doc No. E/1992/23.

[53] Ibid Para 1.

[54] Ibid Para 5. Article 11 (1) of the ICESCR provides that 'the States Parties recognise the right of everyone to an adequate standard of living for himself and his family, including adequate food, clothing and housing, and to the continuous improvement of living conditions. The States Parties will take appropriate steps to ensure the realisation of this right, recognising to this effect the essential importance of international cooperation based on free consent.'

[55] General Comment No. 4 (note 51 above) Para 14.

policies, budgets and prohibition from forced evictions.[56] The CESCR observes that there exists a gap between the standards set in Article 11 (1) of the ICESCR and the prevailing situations or resource constraints in many parts of the world.[57] Many States that have been examined by the CESCR have expressed the difficulty in implementing the right to housing. However, the CESCR states succinctly that the right to adequate housing applies to everyone and the right should be interpreted in the broader sense to include not only brick and mortar but also to include security, peace and dignity.[58]

3.3.1.1 Security of Tenure

Security of tenure includes rental accommodation either public or private, lease, emergency housing, cooperative housing, owner-occupation, and informal settlements, including occupation of land or property.'[59] The CESCR observes that every person should enjoy a degree of security of tenure notwithstanding the form of tenure that guarantees legal protection against forced evictions.[60] General Comments sets out factors that must be taken into account in determining whether particular forms of shelter constitute 'adequate housing' for the purposes of the provisions of the ICESCR. The factors include security of tenure, access to services, materials, facilities and infrastructure. The factors also include affordability, habitability and accessibility to location that allows access to social amenities, including housing that enable cultural identity and diversity.[61] CESCR also observes that the right to housing cannot be viewed in isolation of other rights. In that regard, the right to housing is to be enjoyed together with other rights such as dignity, non-discrimination, freedom of association, residence and the right to participate in public decision making.[62]

The CESCR elaborates on the 'enabling strategies' combined with full commitment to obligations under the right to housing.[63] The measures include resource allocation and policy initiatives as well as legislative and administrative interventions.[64] Legislatures, courts and

[56] J Dugard, M Clark, K Tissington & S Wilson 'The Right to Housing in South Africa' in Foundations for Human Rights *Socio-Economic Rights: Progressive Realisation?* (2016) 159.
[57] General Comment No. 4 (note 52 above) Para 5.
[58] Ibid Paras 6-7.
[59] Ibid Para 8 (a).
[60] Ibid.
[61] Ibid Para 8 (a) – (g).
[62] Ibid Para 9.
[63] Ibid Para 14. The obligation, according to the CESCR is to realise the right for every individual in the shortest time possible in accordance with the maximum of the available resources.
[64] Ibid Para 15.

the executive arms of governments have to play their respective roles for the right to adequate housing to be progressively realised.

The CESCR also views many elements of the right to adequate housing consistent with domestic legal remedies depending on the legal system of the State.[65] The areas include among others, legal appeals aimed at prevention of planned evictions through court injunctions and legal procedures seeking compensation from forced evictions.[66] Forced evictions are *prima facie* regarded as incompatible with the provisions of the ICESCR and can only be justified in exceptional circumstances which adhere to the principles of international law.[67]

More importantly, the CESCR is specific on the right to housing by requiring State parties to take immediate measures and ensure security of tenure of housing for all.[68] The measures imposed by the CESCR include obligations to respect and protect rights. The rights can be immediately achieved through adoption of relevant legislation notwithstanding the delicate tasks involved in enacting and passing them.[69] Langford and King observe that legislation on the right to housing as guided by the CESCR provides security of tenure to occupiers of land and houses as well as guidance to State and non-state actors on how forced evictions can be carried out if circumstances prove to be inevitable.[70]

Security of tenure enhances protection from arbitrary evictions. The protection from arbitrary evictions by the law is significant since it discourages forced evictions that may be executed by State and non-state actors. Issuance of formal titles to land can increase security of tenure of individuals and communities, which can be a remedy to arbitrary evictions.

[65] Ibid Para 17.
[66] Ibid.
[67] Ibid.
[68] Ibid Para 18.
[69] M Langford & J King 'Committee on Economic, Social and Cultural Rights Past, Present and Future' in M Langford (ed) *Social Rights Jurisprudence: Emerging Trends in International and Comparative Law* (2009) 487.
[70] Ibid.

3.3.1.2 Protection from Forced Evictions

The CESCR General Comment No. 7[71] was adopted to address the prevalence of forced evictions in the world. The General Comment contains the normative content of protection against forced evictions both in substance and procedure. In Para 2, the CESCR underscores the seriousness and prevalence of forced evictions across the globe. The CESCR defines forced evictions as 'the permanent or temporary removal against their will of individuals, families and/or communities from the homes and/or land which they occupy, without the provision of, and access to, appropriate forms of legal or other protection'.[72] It further stated that forced evictions are associated with conflict and some associated with development of infrastructural projects.[73]

The General Comment also obligates State parties to use all the appropriate means to promote the right to adequate housing by refraining from forced evictions and ensuring that the law is enforced against agents of the State and non-state actors who carry out forced evictions.[74] The CESCR notes that States must enact legislation that protects the security of tenure which should apply to State and non-state agents that carry out forced evictions. States are obligated to ensure legislative and other administrative measures are adequate to prevent and punish perpetrators of forced evictions.[75]

States are also supposed to put in place mechanisms for providing legal remedies to people affected by forced evictions. States must also put in place procedural and due process protections regarding forced evictions. The procedures and processes include genuine and prior consultations with the parties affected, adequate reasonable notice to the affected parties before eviction is done, information on the proposed eviction to be provided, provision of legal remedy and aid where applicable and identification and provision of alternative land and housing within reasonable time to those affected.[76]

The main aim of the General Comment is to protect against forced evictions. It ensures that any eviction should not result in vulnerability and homelessness and should not lead to

[71] UN CESCR 'General Comment No. 7 The Right to Adequate Housing (Art.11.1): Forced Evictions' (1997) UN Doc E/1998/22. It was adopted by the CESCR on 20 May 1997 to respond to the prevalence of cases of forced evictions in the world.
[72] Ibid Para 3.
[73] Ibid Paras 6-7.
[74] Ibid Para 8.
[75] Ibid Para 9.
[76] Ibid Para 15.

violation of other rights provided in other international law instruments. It also ensures that forced evictions can only be carried out in exceptional circumstances and in due regard to standards set out in international law. It further identifies the vulnerable groups that are prone to forced evictions. The groups include women, children, youth, older persons, indigenous people, ethnic and other minorities, and other vulnerable individuals and groups.[77] The ICESCR succinctly makes provisions on non-discrimination and obligates States to take appropriate measures to ensure that no form of discrimination is involved where evictions occur.

The CESCR provides clarifications on the procedures to be followed where evictions are inevitable and especially evictions that involve large groups. The CESCR recommends that States should ensure that they explore feasible alternatives to ensure that the affected people are consulted and at the very least, minimise the use of force.[78] In instances where forced evictions are justified, they should be carried out in accordance with the principles of proportionality and reasonableness and in compliance with international human rights law.[79] The CESCR makes it clear that forced evictions should not in any way lead to homelessness and vulnerability of the people to violations of other rights.

The CESCR published recommendations in response to individual complaints regarding violation of the right to housing under the Optional Protocol to the International Covenant on Economic, Social and Cultural Rights (OP-ICESCR).[80] The case of *I.D.G. v. Spain*[81] was presented under Article 9 of the OP-ICESCR by Ms. I.D.G, a Spanish national who claimed to be a victim of a violation of her rights under Articles 11 and 2, Paragraph 1, of the ICESCR by the State of Spain.[82] The claimant defaulted in repayment of a loan that had been advanced to her by a financial institution to purchase a house to live in as her residence.

The applicant claimed that the notice for foreclosure issued by Madrid Courts Central Notification and Enforcement Service was not adequate since it had not been published in the official gazette and she was unaware of the mortgage enforcement procedure undertaken by

[77] Ibid Para 10.
[78] Ibid Para 13.
[79] Ibid Paras 14-16.
[80] Optional Protocol to the International Covenant on Economic, Social and Cultural Rights 10 December 2008 UN Doc A/RESE/63/117.
[81] CESCR Communication 2/2014 UN Doc E/C.12/55/D/2/201 dated 13 September 2015.
[82] Ibid Para 2.1.

the bank.[83] The Court dismissed the application thereby prompting the applicant Ms. I.D.G to file an appeal at the Constitutional Court of Spain. The Constitutional Court also dismissed the application. The applicant thereafter filed the complaint with the CESCR claiming violation of her right to housing provided under Article 11 of the ICESCR.

The CESCR established the obligation of the States to provide for effective remedies in aspects related to mortgage payments before foreclosure.[84] The CESCR emphasised the importance of providing adequate personal notice in foreclosure procedures and adoption by States of adequate legislative measures to deter similar occurrences in the future by stating that:

> …the State has the obligation to adopt appropriate legislative or administrative measures to ensure that notification by public posting of notice in mortgage enforcement procedures is strictly limited to situations in which all means of serving notice in person have been exhausted; and that it ensures sufficient exposure and long enough notice that the affected person has the opportunity to take full cognizance of the start of the proceedings and can attend.[85]

In view of the recommendation by the CESCR, inadequate notice in a mortgage enforcement procedure may affect the right to housing. The decision and guidance by the CESCR is of essence since it provides a framework for periodic monitoring the conduct of States in respect of the right to housing. The CESCR does not only address the compatibility of States conduct with SERs enshrined in the ICESCR but also develops an authoritative interpretation that clarifies the content, limit and scope of rights.[86]

The CESCR further makes concluding observations pertaining to state reports made under the ICESCR. The CESCR has underscored the nature of State obligations in respect of forced evictions and the right to housing in the concluding observations. In the 2014 Concluding Observations on Indonesia, the CESCR observed that forced evictions were carried out without adequate reparation and alternative housing in the justification of undertaking development projects.[87] The CESCR was also concerned that the legislation on evictions was inconsistent with international human rights standards which include consultation, provision

[83] Ibid Para 17(a).
[84] Ibid Para 17(c).
[85] Ibid Para 17(b).
[86] B Sanchez 'The UN Committee on Economic, Social and Cultural Rights Decision in *I.D.G. v. Spain*: The Right to Housing and Mortgage Foreclosures' (2016) 3 *European Journal of Human Rights* 322.
[87] UN CESCR 'Concluding Observations on the Initial Report of Indonesia' (2014) UN Doc E/C.12/IDN/CO/1 Para 30.

of adequate notice and provision for alternative housing or adequate compensation in instances where evictions are inevitable.[88]

The CESCR recommended that Indonesian legislation on forced evictions should be altered to conform to international standards and especially with General Comment No. 7. The CESCR further observed that Indonesia was obligated to ensure that eviction legislation ensures that evictions should only be carried out as a last resort coupled with strictly defined safeguards under which evictions can take place and provision of adequate alternative housing or compensation to victims of forced evictions.[89]

The CESCR in its 2008 Concluding Observations on Kenya noted systemic forced evictions of pastoralist communities and people living in informal settlements without prior notice and provision of adequate alternative housing or compensation.[90] The CESCR singled out the *Ogiek* community as one that was most affected by forced evictions. The CESCR recommended that Kenya should adopt legislation or guidelines that define the parameters for evictions in accordance with General Comment No.7 and make provision for redress for victims of forced evictions which include provision for alternative housing.[91]

General Comment No.7 elaborates the procedural requirements that should be observed by State Parties when carrying out evictions. The CESCR considers that States should ensure that all affected persons are provided with adequate and reasonable notice prior to the scheduled date of eviction, full disclosure of the intended eviction, the actors to be involved and the remedies available for the affected people.[92] States should also provide legal remedies and an opportunity for consultation with those affected before evictions are effected. The CESCR, in doing so provides procedural guarantees that safeguards security of tenure which is a key component to protection from arbitrary evictions.

The following part evaluates thematic instruments protecting against forced evictions. The two treaties discussed in this study address the situation of women and persons living with disability thus conferring specific protections and ensuring non-discrimination. Both treaties

[88] Ibid.
[89] Ibid.
[90] UN CESCR 'Concluding Observations of the Committee on Economic, Social and Cultural Rights' (2008) UN Doc E/C.12/KEN/CO/1 [Para 31].
[91] Ibid.
[92] General Comment No 7 (note 71 above) Paras 13-21.

provide for the right to housing which is an important component in protection against forced evictions.

3.4 Thematic Instruments Protecting Against Forced Evictions

Thematic instruments are limited in the sense that they protect the rights of specific groups of people in society. The study will address two thematic instruments which include the Convention on the Elimination of all Forms of Discrimination against Women (CEDAW) and the Protocol which target women and the Convention on the Rights of Persons with Disabilities (CRPD) which protects the rights of people living with disabilities.

The instruments contain the principle of non-discrimination in their respective preambles but most importantly and relevant to this research, they provide for the right to housing. The adoption of the two thematic international law instruments is indicative of the increasing recognition of the complexity of women and disability issues, and the fact that they may not be effectively addressed by mainstream human rights instruments.

3.4.1 Convention on the Elimination of All Forms of Discrimination against Women (CEDAW)

CEDAW[93] provides in its preamble, that discrimination against women is a violation of the principles of equality of rights and respect for human dignity. The preamble also states that discrimination is an obstacle to the participation of women on equal terms with men, in the political, socio-economic and cultural spheres. CEDAW obligates States to enact legislation and adopt other measures to ensure non-discrimination against women.[94]

CEDAW protects women against discrimination in many spheres of life.[95] Though CEDAW does expressly provide for the right of individual women to have land or property, it provides

[93] CEDAW (note 11 above). CEDAW entered into force on 3 September 1981.

[94] Ibid Article 2(b) obligates States to enact legislation and adopt measures, including sanctions where appropriate, prohibiting all discrimination against women, to establish legal protection of the rights of women on an equal basis with men and, to ensure through competent national tribunals and other public institutions the effective protection of women against any act of discrimination. In the same vein, Article 2(f) calls upon States to abolish existing laws, policies and practices that discriminate against women. See L Farha 'Committee on the Elimination of Discrimination against Women, Women Claiming Economic, Social and Cultural Rights–The CEDAW Potential' in M Langford (ed) *Social Rights Jurisprudence: Emerging Trends in International and Comparative Law* (2009) 553-554. Farha states that CEDAW has the potential to be the most effective international human rights instrument for the protection and promotion of economic, social and cultural rights for women.

[95] Articles 10-16 of CEDAW. The spheres of life that CEDAW protects women include education, employment, healthcare, equality before the law among others.

for equal treatment with men and non-discrimination in administration of property. Discrimination includes:

> …any distinction, exclusion or restriction made on the basis of sex which has the effect of impairing or nullifying the recognition, enjoyment by women, irrespective of their marital status, on a basis of equality of men and women, of human rights and fundamental freedoms in the political, socio-economic, cultural, civil or any other field.[96]

CEDAW is interpreted according to the prevailing circumstances facing women at a particular time. The CEDAW Committee (the Committee)[97] interprets the convention and gives general recommendations and concluding observations on reports submitted to it by State Parties. The Committee adopted General Recommendation No. 28 in 2010, [98] clarifying the extent of discrimination against women. It provides the nature and scope of obligations of State Parties by stating that States have an obligation to respect, fulfil and protect women's rights and refrain from enacting laws, formulating policies, regulations, programmes, adopting administrative procedures and institutional structures that infringe on enjoyment of SERs.[99]

The Committee, in its Concluding Observations on Kenya in 2017 recommended that Kenya should protect the rights of women and girls with disabilities by ensuring their equal access to housing.[100] The Committee further recommended that Kenya should introduce measures to address negative customary practices which affect full enjoyment of property rights by women in the rural areas.[101] The rights of women in rural areas include women within rural communities and indigenous communities that formed part of this study. The Committee advocates for protection of land rights of women by issuing them individual land titles as a means to address discrimination.

The Committee, in its Concluding Observations on Australia in 2018 observed that indigenous women seeking to claim native title rights to lands faced difficulties.[102] The

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[96] Ibid Article 1.

[97] The Committee is the UN treaty body that oversees the Convention on the Elimination of All Forms of Discrimination against Women (CEDAW) established under Article 17 of CEDAW.

[98] CEDAW Committee 'General Recommendation No. 28 on the Core Obligations of States Parties under Article 2 of the Convention on the Elimination of All Forms of Discrimination against Women' (2010) UN Doc CEDAW/C/GC/28.

[99] Ibid Paras 8 & 9.

[100] CEDAW Committee 'Concluding Observations on the Eighth Periodic Report of Kenya' (2017) UN Doc CEDAW/C/KEN/CO/8 Para 47 (a).

[101] Ibid Para 42 (c).

[102] CEDAW Committee 'Concluding Observations on the Eighth Periodic Report of Australia' (2018) UN Doc CEDAW/C/AUS/CO/8 Para 51 (j).

Committee recommended provision for legal assistance to indigenous women including assistance to make claims under the Native Title Act and other statutory land rights schemes.[103] Regarding the right to housing, the Committee recommended that Australia ensures access to affordable housing to women and further take appropriate measures that enable older women to have access to adequate housing that meets their specific needs.[104]

In its earlier recommendation, the CEDAW Committee had urged the Australian government to ensure that women have equal access to individual ownership of native land.[105] Kambel rightly observes that the convention does not have an independent right of individual women to have property or land.[106] However, Kambel notes that there is a link between access to land by women with access to credit and strongly suggests that governments should ensure women's access to individual real (alienable) titles to use as collateral.[107]

3.4.2 Convention on the Rights of Persons with Disabilities

The Convention on the Rights of Persons with Disabilities also known as the Disability Convention (CRPD)[108] came into force in 2008 with the aim of ensuring that disabled persons are treated with dignity and ensuring that there is no discrimination against such persons. Kenya is a State party to the CRPD. The Committee on the Rights of Persons with Disabilities (the Committee)[109] is the monitoring body which also adjudicates individual complaints in terms of the Optional Protocol to the CRPD.[110] The CRPD is the first binding instrument protecting the rights of the people living with disability.[111]

The CRPD provides that discrimination on the basis of disability includes distinction, exclusion or restriction which affects the recognition, enjoyment or exercise, on an equal basis with others, of all human rights and fundamental freedoms in the political, economic,

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[103] Ibid Para 42 (c).
[104] Ibid Para 46 (e).
[105] CEDAW Committee 'Concluding Observations: Australia' (1997) U.N. Doc. A/52/38/Rev.1 Para 377.
[106] ER Kambel *A Guide to Indigenous Women's Rights under the International Convention on the Elimination of All Forms of Discrimination against Women* (2012) 21.
[107] Ibid 22.
[108] United Nations Convention on the Rights of Persons with Disabilities, 2006 and entered in force in 2008.
[109] Article 35 of CRPD. The Committee on the Rights of Persons with Disabilities is the body of independent experts which monitors implementation of the Convention by the States Parties who are required to submit reports initially within two years and thereafter after four years.
[110] J Dugard & J Dugard 'Human Rights' in J Dugard, MD Plessis, T Maluwa and D Tladi (eds) *Dugard's International Laws: A South African Perspective* (2018) 482.
[111] E Mandipa 'A Critical Appraisal of the Right to Inclusive Education for Children with Disabilities in Zimbabwe' (2008) 4 *Afro Asian Journal of Social Sciences* 8.

social, cultural, civil or any other field.[112] The CRPD encompasses non-discrimination as one of its general principles.[113] The other important component of the CRPD is reasonable accommodation which entails:

> …the necessary and appropriate modification and adjustments not imposing a disproportionate or undue burden, where needed in a particular case, to ensure to persons with disabilities the enjoyment or exercise on an equal basis with others of all human rights and fundamental freedoms.[114]

Relevant to protection against evictions and the right to housing, the CRPD obligates State Parties to ensure adequate standards of living for people with disabilities. Article 28 provides that:

> …State parties recognise the right of persons with disabilities to an adequate standard of living for themselves and their families, including adequate food, clothing and housing, and to the continuous improvement of living conditions, and shall take appropriate steps to safeguard and promote the realisation of this right without discrimination on the basis of disability.

The Committee on the Rights of Persons with Disabilities (the Committee)[115] receives individual complaints and also monitors compliance with the CRPD. The Committee makes concluding observations on State reports submitted by State Parties. In the 2019 Concluding Observations in respect of Australia, the Committee observed that accessible social housing was lacking, a phenomenon limiting the capacity of persons with disabilities to choose their place of residence.[116] The Committee recommended that Australia should implement the right to housing for persons with disabilities by stating that:

> …the State of Australia should increase the range, affordability and accessibility of public and social housing for persons with disabilities, including by implementing a quota for accessible social housing and by developing regulations and standards to guarantee the progressive application of universal design principles in accessible housing.[117]

The Committee observes that affordability and accessibility are essential in protecting the right to housing for persons living with disability. The disabled as a disadvantaged group must be accorded full and sustainable access to adequate housing resources. According to the Committee, Australia is obligated to prioritise housing needs for disabled people. The

[112] Article 2 of the CRPD.
[113] Article 3 of the CRPD.
[114] Article 2 of the CRPD.
[115] The Committee consists of eighteen (18) members who, according to the Optional Protocol monitor compliance with the CRPD by member states.
[116] UN CRPD 'Concluding Observations: UN Report on Australia's Review of the Convention on the Rights of Persons with Disability' (2019) UN Doc CRPD/C/AUS/CO/1 Para 37 (b).
[117] Ibid Para 38 (b).

Committee recommended that persons with disabilities be included in the priority areas of poverty and homelessness reduction programmes by the government.[118]

The right to housing for the disabled is recognised in reports of the former special rapporteur on adequate housing (the special rapporteur). According to the special rapporteur,[119] persons living with various forms of disability in Kenya are disadvantaged in areas of land, housing and property due to the country's lack of coordinated policy and law on housing and land. The cultural bias and insensitive laws have contributed to the curtailing of the access to property for disabled persons.[120] The special rapporteur in the year 2020 report,[121] recognised that States should provide access to safe, secure and dignified emergency accommodation, with necessary support and without discrimination on any grounds which includes disability.[122] The significance of these recommendations by the special rapporteur would protect people with disability from forced evictions if implemented by the government.

The following section discusses the regional human rights system on protection against forced evictions. The African human rights system in particular has contributed to protection from forced evictions through its treaties and institutions.

3.5 Regional Human Rights System on Protection against Forced Evictions

3.5.1 African Charter on Human and Peoples' Rights

The African Charter on Human and Peoples' Rights (the Charter)[123] is the most important human rights instrument in Africa. The Charter provides that all people have the right to economic, social and cultural development, with due regard to freedom and identity and in the equal enjoyment of the common heritage of mankind.[124] The Charter expressly recognises

[118] Ibid Para 52 (c).

[119] UNGA 'Report of the Special Rapporteur on Adequate Housing as a Component of the Right to an Adequate Standard of Living' (2004) UN Doc E/CN.4/2005/48. The report was done by the former Special Rapporteur Miloon Kothari in his mission to Kenya.

[120] Ibid.

[121] UNGA 'Report of the Special Rapporteur on Adequate Housing as a Component of the Right to an Adequate Standard of Living, and on the Right to Non-discrimination in this Context (2020) UN Doc A/HRC/43/43.

[122] Ibid Para 33.

[123] The African Charter (note 13 above). The Charter has been in force since 21 October 1986. The Charter not only incorporates rights but also imposes rights and duties to states and individuals. It provides for economic and social rights as one of its notable features. It further incorporates social and economic rights in order to give effect to the International Covenant on Economic, Social and Cultural Rights at the regional level. See M Du Plessis & T Maluwa 'The African Union' in J Dugard, MD Plessis, T Maluwa and D Tladi (eds) *Dugard's International Laws: A South African Perspective* (2018) 794 who state that the Charter was inspired by other human rights conventions, though the intention was to make it a unique African document on human rights.

[124] The African Charter (note 13 above) Article 22.

the right to property, work, health and education. However, the Charter does not explicitly refer to the right to adequate housing.

The Charter derives the right to housing from the enjoyment of other human rights, such as the right to privacy, the right to property, peaceful enjoyment of possessions and the right to protection of the family. Article 14 of the Charter states that:

> …the right to property shall be guaranteed. The right may only be encroached upon in the interest of public need, or in the general interest of the community and in accordance with the provisions of appropriate laws.

The ACHPR interpreted Article 14 of the Charter in the case of *Social and Economic Rights Action Centre for Social Rights (SERAC) v Nigeria* (the *SERAC* case)[125] and derived the right to housing from the combination of the provisions in Articles 14, 16 and 18(1). The ACHPR established that the combined effect of Articles 14, 16 and 18(1) read into the Charter a right to shelter or housing.[126] The right to adequate housing in the Charter also encompasses the right to protection against forced evictions.[127]

Regarding forced evictions, the ACHPR stated that member States should ensure that evictions only occur in exceptional circumstances that are authorised by law, carried out in the public interest in accordance with IHRL.[128] The ACHPR elaborated on the obligations of States to protect the right to housing to include minimum core obligations,[129] national plans,

[125] *The Social and Economic Rights Action Centre for Social Rights (SERAC) v Nigeria* Communication 155/96 15th ACHPR AAR Annex V (2000-2001) Para 60.

[126] Article 14 of the Charter guarantees the right to property. Article 16 protects the right to enjoy the best attainable state of physical health and Article 18(1) protects the physical health of the family as the basic unit of the society.

[127] The *SERAC* case (note 125 above) Para 63.

[128] ACHPR 'Principles and Guidelines on the Implementation of Economic, Social and Cultural Rights in the African Charter on Human and Peoples' Rights' (2011) < www.achpr.org/resources> accessed 31 October 2020; 'The Resolution on the Right to Adequate Housing and Protection from Forced Evictions' (2012) ACHPR/Res.231 (LII) 22 October 2012. The ACHPR in Para 1 resolved to put to an end all forced evictions, in particular, forced evictions for development purposes.

[129] ACHPR (note 14 above) Para 79. States should refrain and protect against forced evictions through legislation and in accordance with relevant provisions of the national legislation and international law as the minimum core obligation.

policies and systems,[130] protection of vulnerable groups, equality and non-discrimination[131] and protection against forced evictions.[132]

The ACHPR in its 2014 report on Kenya observed that Kenya had not reported on the measures taken by the government to protect indigenous peoples from forced evictions.[133] The ACHPR further observed that the issue of adequate housing was a major challenge in Kenya and recommended provision for adequate housing for both urban and rural populations.[134] The ACHPR recommended that Kenya should take legislative, policy and other measures to guarantee the right of access to adequate housing and further ensure security of tenure for all citizens and more particularly for the vulnerable and marginalised.

The ACHPR and the African Court, as institutions established under the Charter have developed jurisprudence to protect the right to housing and protection against forced evictions. The following part evaluates jurisprudence generated by the institutions in respect of protection against forced evictions. The cases have provided an interpretative guidance that can benefit Kenyan courts developing jurisprudence that help mitigate the problem of forced evictions. The jurisprudence is also beneficial to the legislature and the executive in adopting policy measures and enacting legislation that protect from evictions.

3.5.2 Forced Evictions Jurisprudence by the ACHPR

3.5.2.1 *The Social and Economic Rights Action Centre for Social Rights (SERAC) v Nigeria Case*

In the *SERAC* case[135] the ACHPR developed forced evictions jurisprudence by interpreting the right to housing as guaranteed in the Charter. The complainants, the Social and Economic Rights Action Centre and the Centre for Economic and Social Rights lodged the complaint before the ACHPR against the Nigerian government (the government) for involvement of the military in irresponsible oil development practices in the Ogoni region.

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[130] Ibid. States should carry out comprehensive reviews of relevant national legislations and policy framework to conform to international human rights provisions.

[131] Ibid. States are obligated to ensure that priority in housing should be given to members of vulnerable and disadvantaged groups.

[132] Ibid. States are obligated to ensure that evictions are carried out legally and in tandem with international law standards and in a manner that does not violate the dignity and human rights to life and security of those affected.

[133] ACHPR 'Concluding Observations and Recommendations on the 8th to 11th Periodic Report of the Republic of Kenya' (2014) < www.achpr.org/resources> accessed 31 October 2020.

[134] Ibid Paras 47 & 53.

[135] The *SERAC* case (note 125 above).

The complainant in the Communication alleged that the Nigerian security forces had condoned and facilitated violations of human rights by attacking, burning and destroying villages belonging to the *Ogoni* people in the pretext of dislodging officials and supporters of the Movement and Survival of the *Ogoni* People.[136] The Communication also alleged that the Nigerian National Petroleum Company had engaged in activities that violated the rights to health, clean environment, housing and food.[137] Within the provisions of the Charter, the complainants alleged that the company violated among other rights, the rights to property, life, food and non-discriminatory enjoyment of rights.[138]

The ACHPR largely relied on the provisions of the CESCR's General Comments 4 and 7 in making its decision. The ACHPR further located the right to housing in the Charter even though there is no express provision in it.[139] In doing so, the ACHPR broadened the jurisprudence on the right to housing and protection from forced evictions. It held that the government violated the right to housing and the right to protection against forced evictions as impliedly protected by Articles 14, 16 and 18(1) of the Charter.[140] In reference to General Comment No. 4, the ACHPR observed that the government violated the collective rights to housing enjoyed by the *Ogoni* people by allowing State and non-state actors to conduct forced evictions that increased the levels of homelessness.[141]

The ACHPR found that the government had violated the rights contained in Articles 2, 4, 14, 16, 18(1), 21 and 24 of the Charter.[142] The ACHPR appealed to the government to ensure protection of the environment, health and livelihood of the *Ogoni* people by stopping all the attacks and prosecuting the perpetrators, ensuring adequate compensation of the victims of

[136] Ibid Paras 1-7.
[137] Ibid Para 10.
[138] Ibid Paras 65-69.
[139] C Okoloise 'Circumventing Obstacles to the Implementation of Recommendations by the African Commission on Human and Peoples' Rights' (2018) 18 *African Human Rights Law Journal* 35.
[140] The *SERAC* case (note 125 above) Paras 60-61. Articles 14, 16 and 18(1) provide for the right to property, right to enjoy the best attainable state of physical and mental health and protection of the family as the basic unit of society respectively.
[141] Ibid Para 63.
[142] Ibid Para 59. Article 2 guarantees enjoyment of the rights and freedoms provided in the Charter, Article 4 provides that rights are inviolable and Article 14 guarantees the right to property. Article 16 of the Charter guarantees enjoyment of physical and mental wellbeing, Article 18 (1) protects the family as the basic unit of society, Article 21 provides for the right to dispose of wealth and natural resources and Article 24 provides for the right to development.

the attacks and among other recommendations, a judicial commission of inquiry to be set up to investigate the human rights violations.[143]

The ACHPR also provided guidance to States on the positive obligations bestowed upon them in protection of SERs. Relevant to the subject of land rights, forced evictions and the right to housing, the ACHPR elaborated the provisions of the Charter which had been violated by the government. The government had failed to protect its citizens from actions by the military in the land of the *Ogoni* people. Even though the Charter does not explicitly provide for the right to housing, the *SERAC* case interpreted the provisions of Article 14 of the Charter to confer the right to housing.[144] The ACHPR found that forced evictions by government forces and private security forces was an infringement of Article 14 and the right to an adequate housing which is impliedly guaranteed by Articles 14, 16 and 18(1) of the Charter and stated that:

> …at a very minimum, the right to shelter obliges the Nigerian Government not to destroy the housing of its citizens and not to obstruct efforts by individuals or communities to rebuild lost homes. The state's obligation to respect housing rights requires it, and thereby all of its organs and agents, to abstain from carrying out, sponsoring or tolerating any practice, policy or legal measure violating the integrity of the individual or infringing upon his or her freedom to use those material or other resources available to them in a way they find most appropriate to satisfy individual, family, household or community housing needs. Its obligations to protect obliges it to prevent the violation of any individual's right to housing by any other individual or non-state actors like landlords, property developers, and land owners, and where such infringements occur, it should act to preclude further deprivations as well as guaranteeing access to legal remedies. The right to shelter even goes further than a roof over one's head. It extends to embody the individual's right to be let alone and to live in peace, whether under a roof or not.[145]

In elaborating on the component of the right to housing, the ACHPR stated that the right to shelter entails more than the protection and provision of a roof over one's head.[146] The ACHPR construed the right to housing to include the right to live in peace whether under a roof or not and the right not to be forcefully evicted from a home by both State and non-state actors.

The ACHPR further observed that governments had the duty to protect the rights of citizens, not only through legislation and effective enforcement but also from human rights violations perpetrated by groups and private individuals.[147] The ACHPR laid emphasis on the obligation

[143] Ibid.
[144] Ibid Para 63.
[145] Ibid Para 61.
[146] Ibid Para 63. The ACHPR echoed the CESCR's recommendations in General Comment No. 4 on the Right to Adequate Housing.
[147] Ibid Para 57.

of States to prevent private parties or groups from acting freely and with impunity thereby violating rights recognised in the Charter by stating that:

> …the State is obligated to investigate every situation involving a violation of the rights protected by the Convention. If the State apparatus acts in such a way that the violation goes unpunished and the victim's full enjoyment of such rights is not restored as soon as possible, the State has failed to comply with its duty to ensure the free and full exercise of those rights to the persons within its jurisdiction. The same is true when the State allows private persons or groups to act freely and with impunity to the detriment of the rights recognised by the Convention.[148]

The case is significant because the guidance and decision given by the ACHPR in the case offers useful lessons to victims of forced evictions on how to seek for protection of their rights through regional enforcement mechanisms. The decision reaffirmed the positive obligations which States have in respect of housing rights of their citizens and reiterated that the obligations must be carried out materially by the State.[149] The case was instrumental in interpreting the obligations of States in respect to the right to housing and protection from forced evictions.

3.5.2.2 Centre for Minority Rights Development (Kenya) and Minority Rights Group International on Behalf of Endorois Welfare Council v Kenya Case

The *Endorois* case[150] provided an analysis on the human rights obligations by the government of Kenya (the government) and provides a useful analytical tool on the treatment of indigenous peoples in Kenya and beyond. The complaint before the ACHPR concerned violation of rights contained in the Charter, international law and Kenyan law by the government for forcefully removing the community from its ancestral lands within the Rift Valley Province of Kenya without consultations and without adequate compensation.[151] The complainants claimed that before dispossession of its land, it had established a way of life that was linked to their ancestral land. The community is part of the pastoralist indigenous peoples in Kenya with an estimated population of 45 621.[152]

The community alleged breach of Article 14 of the Charter that provides for protection of the right to property. It further argued that property rights that protect them were also derived

[148] Ibid Para 176.

[149] J Gondi 'A Review of Economic, Social and Cultural Rights Jurisprudence at the African Commission on Human and Peoples' Rights and the Constitutional Court of South Africa The Kenyan Section of The International Commission of Jurists *Human Rights Litigation and the Domestication of International Human Rights Standards in Sub-Saharan Africa* (2009) 126.

[150] Communication 276/2003.

[151] Ibid Para 3.

[152] Republic of Kenya *2019 Population and Housing Census Volume IV: Distribution of Population by Socio-Economic Characteristics* (2019) 423.

from Kenyan law and encroachment on its land was not done in accordance with the appropriate laws referred to in both Kenyan and international law. [153] Apart from the claim of forced eviction and encroachment on its land, it also alleged breach of other rights which included breach of Article 8 of the Charter which guarantees freedom to practise religion and violation of the right to development as guaranteed in Article 22 of the Charter amongst other claims.

The government responded by stating that the community was not a distinct community, different from the rest of the neighbouring communities.[154] The government claimed that by establishing the Lake Bogoria Game Reserve, it complied with the appropriate Kenyan and international law by providing an alternative settlement area for the community.[155] The government further claimed that it had compensated the community when the land was initially designated as a game reserve and formally gazetted.[156]

The ACHPR ruled in favour of the community on all the claims laid before it by the complainant and found the government liable for violations of the rights provided for in the Charter. The ACHPR also made a series of wide-reaching recommendations for the government in interpreting its obligations to protect and promote the rights of the community in the Charter. The ACHPR relied heavily on the provisions and guidance by the CESCR in General Comments 4 and 7 on the right to housing and protection against forced evictions.[157]

The ACHPR ruled that the government had violated all the rights in the Charter as submitted by the complainants. The ACHPR found that the land claimed by the community supports culture, religion and traditional way of life.[158] The ACHPR found that the government had violated the freedom of the community to exercise religious freedom and practise its culture by forcefully evicting it from its ancestral land.[159] The ACHPR recommended unrestricted access to its land around Lake Bogoria and the surrounding sites to enable the community to use them for its social, economic and cultural activities.[160]

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[153] The appropriate law referenced include the Constitution of Kenya 1969 and the Forests Act Cap 385 Laws of Kenya.
[154] The *Endorois* case (note 150 above) Para 142.
[155] Ibid Para 143.
[156] Ibid.
[157] Ibid Para 200.
[158] Ibid.
[159] Ibid.
[160] Ibid Para 249.

The ACHPR recognised that the community was entitled to its land and recommended to the government to recognise the rights of ownership of land by the community, facilitate restitution of its land as a result of forced eviction and provide unrestricted access to Lake Bogoria. The ACHPR recognised the community's ownership of its ancestral land notwithstanding its lack of formal titles to land and in doing so, vindicated their right to own land, to use the natural resources and to be protected from forced evictions.[161]

The ACHPR made far reaching decisions which protect the rights of indigenous peoples thus setting a standard by establishing new jurisprudence. This was a departure from the decisions made previously by the High Court of Kenya in the *Joseph Letuya* and *Francis Kemai* cases.[162] The decisions of the High Court did not recognise indigenous communities' rights to utilise their land and benefit from the resources.

The ACHPR is significant in the protection against evictions. The ACHPR set standards for governments to consider indigenous communities as partners and beneficiaries of development projects rather than implementing them without consultations and in breach of the communities' traditional rights to land.[163] The standard set by the ACHPR will oblige governments to consult indigenous peoples in their development policies. Prior informed consent becomes the minimum standard that has to be achieved by States before undertaking any development initiative on lands occupied by indigenous peoples.'[164]

3.5.2.3 *Sudan Human Rights Organisation, Centre on Housing Rights and Evictions v Sudan* Case

The *Sudan case*[165] concerned an alleged violation of human rights by the government of Sudan against the people of Darfur region of Southern Sudan. The State of Sudan (the State) allegedly violated housing rights by forcefully evicting the people from their homes and lands

[161] Ibid Paras 90 & 209; K Sing'oei & J Shepherd 'In Land We Trust': The Endorois' Communication and the Quest in Land We Trust': The Endorois' Communication and the Quest for Indigenous Peoples' Rights in Africa' (2010) 16 *Buffalo Human Rights Law Review* 59-60.

[162] *Joseph Letuya & 21 Others v Attorney General & 5 Others* (2014) eklr and *Francis Kemai & Others v Attorney General & 3 Others* (2006) 1 KLR (E & L) 326. See Section 2.5.1.1 of Chapter two for a comprehensive analysis of the cases.

[163] L Claridge *Landmark Ruling Provides Major Victory to Kenya's Indigenous Endorois Centre for Minority Rights Development & Minority Rights Group International (MRG) on behalf of the Endorois Community v The Republic of Kenya* < https://www.refworld.org> accessed 30 April 2020.

[164] The *Endorois* case (note 150 above) Para 289.

[165] Communication 279/03, 296/05, 28th ACHPR AAR Annex (Nov 2009-May 2010).

and destroying water resources, agricultural production and livestock.[166] The specific violations alleged by the complainants included violations of the right to life, the right to property, the right to housing including the right to protection against forced evictions among other rights provided for in the Charter.[167]

The complainant alleged large-scale killings, the forced displacement of populations, destruction of public facilities, properties and disruption of life.[168] The complainant further alleged that the State had violated the right to adequate housing as provided in international law instruments and invited the ACHPR to adequately investigate and prosecute the perpetrators of forced evictions and destruction of houses.[169]

The State in response stated that it had taken measures to deal with the issues raised by the complainant through the Darfur Peace Agreement adopted on 5 May 2006.[170] The State further averred that it had been facilitating the return of internally displaced persons by providing basic services such as water, health, education and housing.[171] The State further averred that the complainant did not exhaust the existing legal, judicial or administrative means to address the allegations presented before the ACHPR.[172]

The ACHPR considered the State's obligation to protect, respect and fulfil human rights and found that the State did not act diligently to protect the civilian population in the Darfur region against human rights violations by its forces.[173] The ACHPR also established that the State failed in its obligations to provide immediate remedies to the victims.[174] The ACHPR further reiterated that forced evictions hindered the people in the Darfur region from engaging in social, economic and cultural activities. The ACHPR found that the State had violated Articles 1, 4, 5, 6, 7(1), 12(1) and (2), 14, 16, 18(1) and 22 of the Charter.[175] The

[166] Ibid Para 8.
[167] Ibid Paras 2 & 3.
[168] Ibid Para 3.
[169] Ibid Paras 116-119.
[170] The *Sudan* case (note 165 above) Paras 73 & 127.
[171] Ibid Paras 134 & 135.
[172] Ibid Para 75.
[173] Ibid Para 168.
[174] Ibid.
[175] Article 1 of the Charter calls upon member states to adopt legislative and other measures to give effect to the rights, duties and freedoms provided in the Charter. Article 4 provides for respect for life and integrity of the person. Articles 5 and 6 provide for respect for dignity and right to liberty and security of person respectively. Article 7 (1) provides for the right to be heard. Article 12 (1) and (2) provide for freedom of movement and protection of national security, law and order, public health or morality. Article 14 guarantees the right to

ACHPR thereafter recommended to the State to take all the necessary measures to protect the victims of the human rights violations in Darfur including undertaking legislative and judicial reforms to facilitate redress of cases relating to serious and massive human rights violations.[176]

The ACHPR in this case emphasised the States duty not to engage in forced evictions of its people and also protect their right to housing. Forced evictions and destruction of houses belonging to the people in the Darfur region infringed on those rights. By engaging in destruction of houses and forcefully evicting people, the State failed in its obligations to protect the right to housing and protect against forced evictions. The ACHPR emphasised the failure on the obligations of the State by stating that:

> …the State failed to show that it refrained from forced eviction or the demolition of houses and other property, and that it did not take steps to protect the victims from the constant attacks and bombings, and the rampaging attacks by the Janjaweed militia.[177]

The ACHPR provided guidance to the State to ensure redress for arbitrary evictions. By advising the State to ratify international human rights instruments to which it was not a party, the ACHPR was keen to ensure that the State commits to protect, respect and fulfil human rights as provided in international law instruments.

3.5.3 Jurisprudence by the African Court on Human and Peoples' Rights

The African Court complements the protective mandate of the ACHPR and was not established to replace the ACHPR.[178] The African Court was established because the entire African human rights system under the ACHPR lacked the necessary effective authority to carry out its mandate and necessitated the need for a judicial organ to enable effective protection and enforcement of rights under the African Charter.[179]

The African Court has delivered a judgement against the State of Kenya in the case of *African Commission on Human and Peoples' Rights v Republic of Kenya*.[180] The ACHPR was

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property, Article 16 protects the right to health and Article 18 (1) protects the physical and moral wellbeing of the family. Finally Article 22 provides for the right to development.

[176] The *Sudan* case (note 165 above) Paras 228-229.

[177] Ibid Para 205.

[178] Article 2 of the African Court's Protocol provides for the relationship between the African Court and the ACHPR. It states that the African Court shall, bearing in mind the provisions of the Protocol, complement the protective mandate of the African Commission.

[179] VO Nmahielle 'Towards an African Court of Human Rights: Structuring and the Court' (2000) 6 (1*) Annual Survey of International & Comparative Law* 28.

[180] The ACPHR Application No. 006/2012 <www.african-court.org> accessed 2 February 2020.

the applicant in the case and the government of Kenya (the government) was the respondent. The ACHPR received a Communication from the Centre for Minority Rights Development and the Minority Rights Group International, organisations acting on behalf of the *Ogiek* community. The Communication concerned forced eviction of the community from its ancestral land without consultation and without due regard to the conditions of expulsion from the forest in justification of public need. The ACHPR referred the case to the African Court on the basis of serious human rights violations by the government and for the first time, the African Court heard and ruled on a case concerning indigenous peoples.[181] The applicants alleged violations of Articles 1, 2, 4, 8, 14, 17(2) and (3), 21, and 22 of the Charter.[182]

The African Court held that the government violated provisions of the Charter. The African Court also held that the government had violated the community's land rights as provided for in Article 14 of the Charter read in light of the UN Declaration on the Rights of Indigenous Peoples (UNDRIP).[183] The African Court also found that the government as the respondent in the case had violated the right to culture of the community as provided for in Articles 17(2) and (3) of the Charter by evicting it from the forest where it undertook its cultural activities.[184]

The African Court found the government culpable for violating Article 21 of the Charter by depriving the applicants the right to enjoy and freely dispose of the abundance of food produced by its ancestral land.[185] The African Court further found the government culpable for expelling the *Ogiek* from its ancestral lands against their will, without prior consultation and without respecting the conditions of expulsion in the interest of public need thus violating its rights to land as guaranteed in the African Charter and UNDRIP.[186] In ruling on the *Ogiek* case, the African Court broadened the approach and understanding relating to human rights as enshrined in the African Charter.[187]

The regional human rights mechanisms through the referenced cases have demonstrated effectiveness in vindicating the right to housing and also protection against forced evictions.

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[181] M Du Plessis & T Maluwa 'The African Union' in J Dugard et al (eds) *Dugard's International Laws A South African Perspective* (2018) 830.

[182] The *Ogiek* alleged eight violations of their rights to life, property, natural resources, development, religion and culture by the government under the African Charter, to which Kenya was a party.

[183] The *Ogiek* case (note 180 above) Para 131.

[184] Ibid Para 194.

[185] Ibid Para 201.

[186] Ibid Para 131.

[187] Ibid.

The Charter being the main normative instrument of the African human rights system has created institutions that have been progressive in complementing national legal frameworks in the African context. The ACHPR and the African Court have in their decisions in cases brought before them elaborated on the obligations of States in protection of the rights in clear terms.

This section analysed case law by both the ACHPR and the African Court. The cases are an important tool to gauge the human rights obligations by Kenya, Nigeria and Sudan provided for under the Charter. The cases lay a foundation for protection of the right to housing and protection of rights including the right to be protected from evictions by State and non-state actors. The decisions are a positive contribution to a robust protection of individual and group rights within the African context.

3.6 Conclusion

The problem of forced eviction is a global phenomenon perpetrated by State and non-state actors. International law instruments have played a crucial role in protection from forced evictions and enhancement of the right to adequate housing. The instruments assist in providing guidance to the legal content such as clarifying duties of States regarding protection from forced evictions and safeguarding housing rights, a bulwark in protection from evictions.

The chapter considered forced evictions in international law through treaties, declarations and agreements. It considered the ICESCR and the relevant General Comments of the CESCR. It further considered thematic instruments and interpretative guidance from the African Charter, regional bodies and courts. The above instruments are important since they protect a series of rights that in theory should ensure adequate dignified existence of people.[188] They also provide principles and a comprehensive framework to address the problem of forced evictions within the Kenyan context.

The chapter discussed and evaluated jurisprudence on forced evictions, particularly indigenous people jurisprudence by the ACHPR and the African Court. The chapter evaluated the contribution made by the CESCR in its General Comments, contributions by academic commentators and regional judicial mechanisms relevant to the subject of forced evictions and the right to housing. The wide range of international and regional instruments

[188] H Demsetz 'Towards a Theory of Property Rights' (2008) 57(2) *The American Economic Association* 347.

will assist the courts to develop a substantive understanding of the scope and content of the right to housing which is a bulwark against arbitrary evictions. The international and regional instruments evaluated in this chapter are critical in informing Kenyan law, policy and institutional framework on addressing the problem of forced evictions.

The next chapter discusses and analyses the Kenyan legal framework on land rights and forced evictions. The chapter also critiques the right to housing and the right to property as important components of protection from arbitrary evictions. The chapter examines the extent to which the legal framework protects against forced evictions.

CHAPTER 4:
KENYAN LEGAL FRAMEWORK FOR LAND RIGHTS AND PROTECTION AGAINST FORCED EVICTIONS

4.1 Introduction

The purpose of this chapter is to discuss and evaluate the domestic legal framework relating to the protection of land rights and protection against forced evictions in Kenya. The Kenyan legal framework includes the Constitution,[1] legislation which includes subsidiary legislation, legal notices and executive orders or administrative guidelines. The legal framework also comprises the substance of common law and equity, international law and customary law. The study focuses on the entire edifice of laws protecting against forced evictions and the right to housing being a major component of protection against forced evictions.

The jurisdiction of superior courts and subordinate courts in Kenya is exercised in conformity with the Constitution, legislation, the substance of the common law, the doctrines of equity and the statutes of general application in force in England on the 12th August, 1897.[2] The substance of common law, doctrines of equity and statutes of general application only apply only as far as the circumstances of Kenya and its inhabitants permit and are subject to qualifications as those circumstances may render necessary.[3] In the order of hierarchy, customary law has been placed at the bottom of all the sources of law including common law and equity.[4] The Judicature Act provides that:

> …the Supreme Court, the Court of Appeal, the High Court, the Environment and Land Court, the Employment and Labour Relations Court and all subordinate courts shall be guided by African customary law in civil cases in which one or more of the parties is subject to it or affected by it, so far as it is applicable and is not repugnant to justice and morality or inconsistent with any written law, and shall decide all such cases according to substantial justice without undue regard to technicalities of procedure and without undue delay.[5]

The chapter evaluates the role of the domestic legal framework and its effectiveness in protection against forced evictions. The main theme interrogated in this chapter is the extent to which the legal framework dealing with land is effective in providing mechanisms to address the problem of forced evictions.

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[1] Republic of Kenya *The Constitution of Kenya* (2010) (hereinafter referred to as the Constitution).

[2] The Judicature Act Cap 8 Laws of Kenya Section 3 (1) a & b; MK Mbondenyi & J Ambani *The New Constitutional Law of Kenya: Principles, Government and Human Rights* (2012) 34.

[3] Ibid Section 3 (1) c.

[4] PK Mbote, C Odote, C Musembi & M Kamande *Ours by Right. Law, Politics and Realities of Community Property in Kenya* (2013) 18.

[5] The Judicature Act (note 2 above) Section 3(2).

Section 4.2 evaluates the scope of land rights and forced evictions within the context of pre-colonial, colonial and post-colonial periods. Section 4.3 evaluates the legal framework for protection against forced evictions. The chapter evaluates the 1969 and the 2010 Constitutions and their contributions on forced evictions. Section 4.4 evaluates the role of the Kenyan national policy framework in respect of forced evictions and protection of the right to housing. Section 4.6 evaluates the legislative framework that protects against forced evictions in Kenya. The chapter concludes in Section 4.7 with an evaluation of the effectiveness of the Kenyan legal framework in addressing the problem of forced evictions.

The following section discusses land rights and the problem of forced evictions from a historical perspective. The essence is to establish the origin of the problem of forced evictions that has persisted to date. The section also evaluates how laws, policies and institutions lay the foundation of the problem.

4.2. Land Tenure Before Colonialism

This section evaluates the legal framework in Kenya in the context of land dispossessions from the colonial times to the present day. The essence of the historical context is to lay the basis for the problem of evictions and housing that persist to date. The land problem can be traced from a historical context and the escalation of the problem over time, during the pre-colonial, the colonial and the post-colonial periods. The study demonstrates that legislation, policies and institutions were instrumental in alienation of land belonging to Kenyans thereby creating the problem of insecurity of tenure that is the major cause of forced evictions.

Before colonialism, the system of landholding was based on communal land tenure governed by customary rules and norms through clans and lineal heritages.[6] Individual ethnic groups exercised ownership collectively and communities described land as communitarian property.[7] Since landholding was communal, production was for collective subsistence rather than individual accumulation of wealth.[8] The factors of production within all communities included land, livestock and labour and were managed on the basis of reciprocity and

[6] JB Ojwang *The Common Law, Judges Law: Land and Environment Before the Kenyan Courts* (2014) 45; HWO Okoth-Ogendo 'The Tragic African Commons, a Century of Expropriation, Suppression and Subversion' in *Land Reforms and Agrarian Change in Southern Africa: An Occasional Paper Series* (2002) 1-5.
[7] Ibid.
[8] PO Ndege 'Colonialism and its Legacies in Kenya' Lecture delivered during Fulbright – Hays Group Project Abroad Program: July 5th to August 6th 2009 at the Moi University Kenya (2009) <africanphilanthropy.issuelab.org> accessed 10 April 2021 [1].

egalitarian ideals that ensured that individuals never slid into abject poverty.[9] The land rights were held under a complex system in which the rights of access to and use of land were regulated by intricate rules, usages and practices that were based on communal solidarity and clan lineages.[10]

Ainsley observes that the collective and communal system of landholding during the pre-colonial period viewed the living land owners as merely holding as trustees for both the living and the future generations.[11] According to Ainsley, land was held and managed as a trans- generational asset. He describes the holding of land in the pre-colonial period as follows:

> …in pre-colonial times land ownership was collective or communal. This system viewed the living land owners as merely holding tenancies at will from the dead, as being merely trustees of the latter. This was all reinforced by religious belief. Lands occupied by a family were not demarcated because their limits were known and respected and possession was seldom disturbed as long as the occupation was effective. The community laid no claim on the produce of the soil other than the well-recognised right to hospitality or of assistance in times of scarcity.[12]

Land resources were held, managed and used as commons by the communities specifically for cultivation, grazing, hunting, transit, recreation, fishing and biodiversity conservation.[13] The commons were also managed and governed by the customary laws at different levels of social structures within the different African communities. At the normative level, individuals and groups in every community accessed land resources on the basis of socially-defined membership criteria and reciprocity by and to each member of the social hierarchy.[14] This form of collective and communal landholding protected the occupants of the land and did not leave them vulnerable since it ensured access to land and resources by all community members.

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[9] Ibid.

[10] Republic of Kenya *Report of the Commission of Inquiry into the Illegal/Irregular Allocation of Public Land* (2004) 1.

[11] JA Ainsley 'Land Tenure Ethics and Land Value Taxation in EW Gachenga et al (eds) *Governance, Institutions and the Human Condition* (2009) 270.

[12] Ibid.

[13] Okoth-Ogendo (note 6 above) 2-3. According to Okoth-Ogendo, land was held as a trans-generational asset.

[14] Ibid.

4.3 The Historical Perspective on Forced Evictions

The British Crown (the Crown) declared Kenya a protectorate in 1895.[15] Following the declaration, it became imperative for the colonial government to make the protectorate economically viable by granting secure land rights and the acquisition of land from the local communities was done through conquests, agreements, treaties and sale.[16] The Crown entered into agreements with Kenyan communities through their illiterate leaders to acquire land and subsequently assert control over the land.[17]

The Crown put in place the colonial land policy that gave exclusive rights to the settler communities on land belonging to local communities in Kenya thereby destroying their traditional patterns of land tenure.[18] The policy introduced western notion of property which impacted the traditional African landholding. The policy displaced the traditional land tenure system by giving exclusive rights of land owned by Kenyan communities to the Crown.[19] The implication of the policy was conversion of common property regimes to individualised property.

The Crown thereafter asserted original title to land and claimed that Africans did not own any land in Kenya.[20] Polsinelli stated that land was seized and people forcibly uprooted from their lands relocated and mistreated by colonial authorities.[21] Polsinelli further argued that the colonialists used legal theories to justify the dispossession of land. The first theory was the '*terra nullius*' theory which entailed empty land.[22] The argument by the Crown was that the land in Kenya and other places in Africa were legally unoccupied until the colonialists arrived within the territories and created property rights for the colonisers through law and occupation.[23]

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[15] J Lonsdale & B Berman 'Coping with the Contradictions: The Development of the Colonial State in Kenya, 1895-1914' (1979) 20 *Journal of African History* 487.
[16] HWO Okoth-Ogendo *Tenants of the Crown: Evolution of Agrarian Law and Institutions in Kenya* (1991) 9-11.
[17] Ibid 7-10.
[18] D Kangethe *An Evaluation of the Effects of Land Tenure on Land Use in Kenya: Evidence of Bondo, Busia and Siaya Districts* (2012) 2.
[19] Okoth-Ogendo (note 16 above) 10.
[20] Ibid.
[21] C Polsinelli 'Right to Land-Right to House and Adequate Standard of Living' in *Human Rights Litigation and the Domestication of Human Rights Standards in Sub Saharan Africa* AHRAJ Casebook Series 1 (2007) 148-149.
[22] Ibid 149.
[23] Ibid.

By asserting original title to all land, the Crown declared ownership of all land within the protectorate and granted subsidiary rights to property users. The traditional resource management institutions which included elders and social structures developed by the communities were undermined by the actions by the Crown.[24] This resulted in uncertainty in access of land by Kenyan communities, exploitation and control of land and land based resources by the Crown.[25]

Colonialism also introduced land alienation, imposition of English property laws and transformation of the customary land holding and tenure systems. It also introduced expropriation, suppression and subversion of the African commons.[26] Lonsdale and Berman observes that the Kenyan colonial State was characterised by primitive accumulation and appropriation of land by and for the benefit of the Crown, confiscation of livestock, taxing households and forcing out labour.[27]

The accumulation and appropriation of land by the Crown impacted landholding by Africans in several ways. Firstly, Africans were forcibly removed from their lands. Secondly, English law relating to property was introduced and thirdly, the customary way of life and customary land tenure by Africans was transformed to privatisation of rights, commoditisation and a formal reconfiguration of the way people relate to land.[28] Colonialism was a key factor in the evolution of the Kenya law relating to property. Colonial administration disrupted indigenous social systems by expropriation of community land leading to extreme poverty.[29]

The Crown subsequently reserved the unproductive land reserves for settlement by the Kenyan communities. The establishment of native reserves that were unfit for human settlement by the Crown had profound consequences. The native Kenyans were displaced and forcefully evicted from their farms resulting in land shortage and crisis linked to access and control of land.[30] The problems in the native reserves and the colonial State's neglect of African agriculture resulted in a profound economic crisis and necessitated political unrest in

[24] Ibid.
[25] Ibid.
[26] Ibid 107.
[27] Lonsdale & Berman (note 15 above) 491.
[28] A Chimwohu 'The 'New' African Customary Land Tenure: Characteristic, Features and Policy Implications of a New Paradigm' (2019) 81 *Land Use Policy* 897-900; Okoth-Ogendo (note 16 above) 8-10.
[29] T Gachagua 'Demystifying the Concept of Community Land: The New Order' (2015) 11(2) *Law Society of Kenya Journal* 157.
[30] K Kanyinga, O Lumumba & KS Amanor 'The Struggle for Sustainable Land Management and Democratic Development in Kenya: A History of Greed and Grievances' in KS Amanor & S Moyo *Land & Sustainable Development in Africa* (2008) 101-102.

search for independence and demand for land restitution. The rebellion by the Kenyan communities grew out of resentment and anger at the mass evictions and expulsions from best agricultural lands set aside exclusively for British farming and residence commonly known as the white highlands.[31]

The second method of land expropriation by the Crown involved the imposition of the concept of private property.[32] The notion of private property was an alien concept to the Kenyan communities within the customary land tenure arrangements. The introduction of formal laws facilitated alienation of land by the British thereby interrupting the customary land holding that existed.[33] The history of land rights exemplifies alienation, displacement of native Kenyans from their lands into reserves and occupation of the lands by the British settlers.

4.3.1 Land Legislation Regime in Colonial Kenya

The problem of forced evictions can be attributed to land alienation and expropriation by the Crown through colonial rule. The colonial land laws, policies and institutions led to the indigenous peoples and other Kenyan communities to lose land and land based resources.[34] Forced evictions of Kenyan communities from their land were legitimised by legislation enacted by the Crown on the onset of colonial rule. The Crown enacted the 1901 Order in Council and defined land to mean all public land that was subject to the control of Her Majesty, the Queen of England.[35] The 1902 Crown Lands Ordinance declared all unoccupied land within the protectorate as Crown land.[36] The enactment of the 1901 Order in Council and the 1902 Crown Lands Ordinance marked the genesis of the problem of forced evictions of Kenyan communities from their land.

The 1902 Crown Land Ordinance was later amended in 1915. The substantive amendment relevant to this study redefined crown lands to include land in actual occupation by native Kenyans. The Crown Land Ordinance 1915 (the Ordinance) provided as follows:

> …crown land shall mean all public land in the protectorate which are for the time being subject to the control of His Majesty by virtue of any treaty, convention or agreement, or by virtue of His

[31] M Meredith *The State of Africa: The History of the Continent since Independence* (2011) 79-80.
[32] Kanyinga et al (note 30 above) 101.
[33] Ibid 102.
[34] Ibid. The Crown used laws to alienate land that belonged to Kenyans and force them out of their lands.
[35] The 1901 Order in Council.
[36] Crown Land Ordinance 1902.

> Majesty's protectorate, and all lands which shall have been acquired by His Majesty for the public service or otherwise howsoever, and shall include all land occupied by native tribes of the protectorate and all lands reserved for the use of the native tribe.[37]

The Ordinance facilitated alienation of land by the Commissioner of lands by granting 99 year leases and grants for temporary occupation. The Ordinance effectively vested land rights of the African people in the Crown and transformed Kenyan communities into tenants of the Crown.[38] It further facilitated allocation of land to the British settler community in freehold or leasehold tenures. The Ordinance, which later became the Government Lands Act,[39] marked the onset of private individual ownership of land. Alienation and forceful eviction of Kenyan communities pursuant to legal provision was buttressed by judicial decisions.

One such judicial decision was made in *Isaka Wainaina wa Gathomo and Kamau Gathomo v Murito wa Indagara, Nanga wa Murito & Attorney General*[40] by the Court of Appeal of Eastern Africa (the CAEA) which interpreted the provisions of the Ordinance. The case concerned two parties who had a dispute over ownership of a parcel of land. The petition sought for the removal of the people in occupation of the contested land on grounds that they were trespassing since the petitioners claimed that they had purchased it before the onset of European settlement.[41] The Attorney General subsequently joined in the matter and claimed that none of the parties in the case had the right to claim the property since the 1915 Ordinance had vested all the land on the British Crown to use on behalf of the native communities.[42]

The CAEA explained that the implication of the Ordinance was that all land was vested in the Crown which would authorise any use of land by Kenyan native communities.[43] The CAEA further stated that the native communities were tenants at the will of the Crown and would only occupy the land, cultivate it for subsistence but could not alienate it. The CAEA stated as follows:

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[37] Section 5 of the Crown Land Ordinance 1915.

[38] Okoth-Ogendo (note 6 above) 12.

[39] Government Land Act Cap 280 Laws of Kenya (now repealed by the Land Registration Act 2012). Pursuant to Sections 1 to 3 of the Act, crown land became government land which was vested in the President who was empowered to make grants or dispositions of any estates, interests or rights in or over alienated government land. The powers were exercised through the office of the Commissioner of Lands.

[40] The CAEA (1922) 23 KLR Vol. IX 102.

[41] Ibid 102.

[42] Ibid 103.

[43] Ibid.

> …in my view, the effects of the Crown Land Ordinance 1915 and the Kenya (Annexation) Order-in-Council 1920 by which no native private rights were reserved, and the Kenya Colony Order-in Council 1921 as I have already stated is clearly, inter alia to vest land reserved for the use of the native tribe in the Crown. If that be so then all native rights in such reserved land, whatever they were under the *Gathaka* (traditional) system disappeared and the natives in occupation of such Crown land became tenants at the will of the Crown of the land actually occupied which would presumably include land on which huts were built with their appurtenances and land cultivated by the occupier-such land would include the fallow. Section 54 of the Crown Land Ordinance 1915 puts a specific embargo on any alienation by such tenants.[44]

The CAEA made a declaration that Kenyans were tenants at the will of the Crown by stating that the native rights to land had disappeared by operation of the legislative provision in the Crown Land Ordinance 1915 and the Kenya (Annexation) Order-in-Council 1920.[45] The effect of the CAEA decision was that the right to land of Kenyan communities was completely extinguished and the communities were prone to evictions by the colonial government.

Mbote observes that the decision in the case disregarded customary rights that existed among the Kenyan communities by stating that:

> …the nullification of the natives' rights in favour of new owners through processes that were not understood by the natives created a duality of rights' system. Indeed the acquisition of land rights for settlers was mainly done through political processes (declaration of the protectorate, designation of land owned by the coloniser) that were followed by instruments giving the political acts the legal force.[46]

The Land Titles Ordinance (the Ordinance)[47] introduced land registration at the coastal part of Kenya in 1908. The essence of this legislation was to cure uncertainty of individual titles. The Ordinance sought to cure the uncertainty by identifying, demarcating crown land and distinguishing it from private land. The Ordinance further established a land court, a recorder of titles and a land title register.[48] The legislation was enacted from a background of ownership of land at the coast by the Sultan of Zanzibar who exercised control over the coast. The Sultan leased any unclaimed land to the British government and the legislation was instrumental in alienation of land at the coast.[49]

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[44] Ibid 104.

[45] Ibid 103.

[46] PK Mbote 'Righting Wrongs: Confronting Land Dispossessions in Post-Colonial Contexts' *East African Law Review* (2009) < https://www.ielrc.org/content/a0909.pdf> accessed 12 March 2022 103-104.

[47] The Ordinance later became the Land Titles Act Cap 282 of the Laws of Kenya (now repealed by the Land Registration Act 2012).

[48] Ibid Sections 4-6.

[49] P Onalo *Land Law and Conveyancing in Kenya* (2019) 175.

The 1908 Ordinance was enacted without knowledge of the local communities which inhabited the parcels of land in accordance with customary land tenure systems.[50] The tenure arrangement was practised by rural African communities where land was held by the communities depending on the traditions and rules set out by the leadership of a particular community. The Ordinance largely deprived coastal communities of their land thereby contributing to a large number of landless and informal settlers and the problem of absentee landlords.[51] The Ordinance also contributed to forceful evictions of the coastal communities from their land to create room for Arab settlers.

The problem of forced evictions persists to date and was a subject of evaluation during the Kenyan Truth, Justice and Reconciliation process. The Truth Commission made the following observation:

> …illegal acquisition of large tracts of land from indigenous communities during the colonial period rendered many communities at the coast and in mainland Kenya landless. Affected communities expected redress through resettlement, restoration of their land and compensation from the subsequent administrations. The government instead alienated more land from already affected communities for the benefit of politically privileged ethnic communities and the political elite.[52]

The process of colonisation had a further adverse effect on the interaction of the native people and their land. The effect was based on both population and production.[53] The populations of the native people were concentrated in reserves and the latter entailed massive exploitation of resources that were found in the land.[54] The loss of land and resources prompted the Kenyan people to organise a political uprising known as the *Mau Mau* movement in search for political independence and restitution of their land. The movement was a peasant and nationalist revolt against British colonial rule and was organised around land grievances by the Kenyan communities.[55] The outbreak of the movement was mainly centred around the colonial land laws, policies and institutions employed by the British colonial authorities on local communities.

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[50] K Muigua, D Wamukoya & F Kariuki *Natural Resources and Environmental Justice in Kenya* (2015) 121.

[51] P Ochieng 'Communal Land Tenure and Property Rights in Tana River County: A Case of Complex Clan Power Dynamics and Dispossessions' in C Odote and PK Mbote (eds) *Breaking the Mould, Lessons For Implementing Community Land Rights in Kenya* (2016) 71.

[52] Republic of Kenya *Report of the Truth Justice and Reconciliation Commission* (2013) XIV.

[53] PK Mbote *Property Rights and Biodiversity Management in Kenya* (2002) 59.

[54] Ibid.

[55] Meredith (note 31 above) 79. Meredith opines that the *Mau Mau* rebellion in Kenya gained notoriety more than any other revolt against British rule in Africa.

The spread of the *Mau Mau* resistance against the colonial administration created a political crisis between 1952 and 1961.[56] The sustained demand by Africans for return of their land led to the realisation by the British administration that so long as Africans were insecure on their own land, the security of the European settlers would be in jeopardy.[57] The British began to make attempts to recognise claims to land by Africans under the African customary law.

In an attempt to recognise customary law of the Kenyan communities, the British administration came up with the Swynnerton Plan (the Plan).[58] The main aim of the Plan was to privatise land ownership through the displacement of indigenous land tenure systems in the Kenyan native reserves that were inhabited by Kenyans and replace it with a system that entrenched private property rights for the Kenyan communities along the lines of English land law.[59] The reforms proposed by the Plan were informed by the fact that the native reserves were congested and largely unproductive leading to informal and haphazard informal settlements.[60] The Plan recommended that security of tenure for Africans had to be safeguarded by providing indefeasible title that would encourage investment and secure financial credit.[61]

The processes of individualisation of titles modelled along the Plan became a contributing factor to land dispossessions among Kenyan communities because communities were not made aware of the implications of the process.[62] The process involved adjudicating land rights, consolidating land fragments into single holdings and issuing freehold titles to individuals. Leys stated that the process created classes of landed and landless Kenyans since the rich would be able to acquire more land and bank credits and the poor farmers less.[63] The process aggravated the problems that had been created by the colonial laws, policies and institutions.

In some areas, the adjudication process was also not effective since rights were granted over land that had previously been forcefully taken from Africans.[64] The reforms proposed by the

[56] T Kanogo *Squatters and the Roots of the Mau Mau 1905-1963* (1987) 125-132.
[57] T Jackson *The Law of Kenya* (1998) 242.
[58] RJM Swynnerton *A Plan to Intensify the Development of African Agriculture in Kenya* (1955).
[59] K Kanyinga *Re-Distribution From Above: The Politics of Land Rights and Squatting in Coastal Kenya* (2000) 8.
[60] F Kariuki, S Ouma & R Ng'etich *Property Law* (2016) 167.
[61] The Swynnerton Plan (note 58 above) 10.
[62] C Leys *Underdevelopment in Kenya* (1975) 52-53
[63] Ibid 52.
[64] Kariuki et al (note 60 above) 219.

Plan failed to address the issue of land alienation, the need for redistribution and the inequalities in ownership between the Crown and Africans and inequalities between African communities.[65] Indeed, the concentration of Kenyan communities within reserves was a contributing factor to the increase of informal settlements.[66] Juma stated that land reserves inhabited by the Kenyan communities remained the property of the government and consent from the Commissioner of Lands was required in order to build dwelling houses, cultivate certain kinds of crops or even keep animals.[67]

The colonial land laws contributed to forced evictions of communities from their land. Forced evictions have persisted since the promulgation of the 1915 Ordinance that declared Africans to be tenants at the will of the Crown. Similarly, the 1908 Ordinance which applied to the coastal part contributed to making local inhabitants informal settlers by virtue of lack of formal titles to land.

The following part elaborates on the eviction of the indigenous *Maasai* community from its land.

4.3.2 The Case Study of the Indigenous *Maasai* Community

The indigenous *Maasai* community lives in both Kenya and Tanzania and leads a pastoralist way of life.[68] The community was evicted from its land following agreements made in 1904 and 1911 between the community and the Crown.[69] In 1904, the Commissioner of the East African Protectorate representing the Crown entered into an agreement with the representatives of the community which resulted in the removal of certain sections of the community to a reserve and subsequently divided the community into two.[70] Pursuant to the 1904 treaty, the community moved from its ancestral land into reserves and the land belonging to the community occupied by white settlers. Subsequently in 1911, the Governor of the Kenyan Protectorate entered into another agreement with the representatives that certain portions of the community members who had resided in the Laikipia area should be moved further south into a reserve.

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[65] Leys (note 62 above) 52.
[66] L Juma 'Nothing but a Mass of Debris: Urban Evictions and the Right of Access to Adequate Housing in Kenya' (2012) 12 (2) *African Human Rights Law Journal* 486-487.
[67] Ibid.
[68] AK Barume *Land Rights of Indigenous Peoples in Africa with Special Focus on Central, Eastern and Southern Africa* (2014) 89.
[69] Ibid 90.
[70] Ibid 71.

The 1904 and 1911 agreements were made by the Crown acting on instructions from and with the sanction of the Secretary of State in Britain.[71] By virtue of the two agreements, the community was pushed into unproductive and disease infested areas that affected its livelihoods including its pastoral way of life. The agreements together with the imposition of British property laws were instrumental in effecting evictions. The community was evicted from large chunks of its land to create space for the settlement of British settlers to facilitate agricultural and commercial activities that were key to economic development in the anticipated new Kenya colony that was formed in 1920.[72]

The state of affairs prompted the representatives of the community to seek redress at the High Court in the case of *Ole Njogo and Others v Attorney General of the East African Protectorate.*[73] The aim of the case was to challenge the 1904 and the 1911 agreements made between the community and the British administration. The community alleged that the alienation of its land by the British government was carried out without consultation and consent.[74] The community also alleged that the representatives who signed the treaties on behalf of the community did not have the mandate from the members of the community.[75] The community sought a declaration by the court that the community was wrongfully removed from its land and that it was entitled to restitution of its land.[76]

The High Court held that there was no legal contract between the Crown and the signatories representing the community as alleged by the representatives of the community in the case. The High Court elaborated that the agreements were in fact treaties made between the Crown and the representatives of the community, whom the High Court described as a foreign tribe living under its protection.[77] Additionally, the Court described the community as protected foreigners who owe obedience to the Crown in the following manner:

> …now, the other parties to these agreements were persons whom the Commissioner and Governor, acting on behalf of the Crown, chose as representatives of the *Maasai* tribe with whom the Crown could enter into such agreements. The *Maasai* tribe, as living within the limits of the East African Protectorate, are not only subjects of the Crown, nor is the East

[71] Ibid.
[72] E Mwangi 'The Transformation of Property Rights in Kenya's Maasai Land: Triggers and Motivations' (2005) 35 *International Food Policy Research Institute* 11 < http://www.capri.cgiar.org> last accessed 6 December 2020.
[73] (1914) 5 EALR 70.
[74] Ibid 78.
[75] Ibid.
[76] Ibid.
[77] Ibid.

> African British territory. But East Africa, being a Protectorate in which the Crown has jurisdiction, is in relation to the Crown a foreign country under its protection, and its native inhabitants are not subjects owing allegiance to the Crown but protected foreigners who in return for that protection owe obedience.[78]

The High Court ruled in favour of the Crown by dismissing the case. The High Court stated that the community, though living in the British Protectorate under the protection of the Crown, was capable of entering into agreements with the Governor and those agreements were in fact treaties and could not be dealt with in Protectorate courts.[79] The High Court further stated that the agreements between the community and the Crown were acts of States which could not be litigated in a municipal court, by stating that:

> …it may have been just or unjust, politic or impolitic, beneficial or injurious, taken as a whole, to those whose interests are affected. These are considerations into which the court cannot enter. It is sufficient to say that even if a wrong has been done, no municipal court of justice can afford a remedy.[80]

The community thereafter appealed to the East African Court of Appeal (EACA) which upheld the decision of the High Court. The EACA stated that by virtue of the 1904 and 1911 agreements, anyone who would not move out of the land affected by the agreements could be forcefully removed through an act of the State.[81] The EACA established that there was nothing that prevented the Crown from exercising its prerogative right of entering into any treaty and from raising any plea in respect of actions brought against it in municipal courts and in respect of acts of the State done by its officers in respect of the treaty.[82] The EACA found no merit in the appeal and dismissed it with costs.

The rulings by the High Court and the EACA in the *Ole Njogo* case contributed to the community losing its land. The community has never recovered from the loss and the betrayal it endured as a result of the 1904 and 1911 agreements.[83] The judgments by the two courts were made on technicalities and not on the substance in the suit. According to Barume, if the courts made the decisions based on the core issues raised by the community, the

[78] Ibid 77.
[79] Ibid 70.
[80] Ibid 80.
[81] Ibid 81.
[82] Ibid 114.
[83] Barume (note 68 above) 93.

outcome would have been different.[84] The intention of the judgement was to ensure that the community was evicted from its land.

The land dispossession of the community is an example of how British land policies brought about land injustices and uprooted communities from their ancestral lands across the country. The *Ole Njogo* case is significant since it demonstrates the colonial land injustices against the community and other Kenyan communities.

The following part demonstrates the role of law in perpetuating the problem of forced evictions during the post-colonial period.

4.4 The Role of Law in Forced Evictions in the Post-Colonial Period

Land was the basis in which the struggle for independence was waged and retains a focal point in history.[85] It continues to be pivotal in the social, economic, political and legal relations and dictates the pulse of nationhood.[86] After independence, the government continued granting individual titles while excluding indigenous communities from reclaiming land that had been taken from them during colonial rule.[87] Access and ownership of land has been a central aspect of development and political change. Indeed, most of the development that took place in African countries, in Kenya in particular, relates to the use of land.[88]

The Registered Land Act (RLA)[89] was enacted in 1963 pursuant to the Swynnerton Plan model with the intention of replacing the land registration statutes that existed. The RLA was intended to consolidate the Registration of Titles Act (RTA),[90] the Government Land Act (GLA)[91] and the Land Titles Act (LTA).[92] The RLA did not consolidate or repeal the RTA, GLA and LTA. The four statutes were to apply as post-independence Kenya land laws, marking a continuation of the colonial land policies. RLA codified land that was mainly held

[84] Ibid.
[85] Republic of Kenya *Report of the Commission of Inquiry into Illegal and Irregular Allocated Lands* (2004) XVII.
[86] Ibid.
[87] Kanyinga et al (note 30 above) 102.
[88] C Juma 'In Land we Trust' in Juma C & Ojwang J.B (eds) *In Land We Trust: Environment, Private Property and Constitutional Change* (1996) 1.
[89] Cap 300 Laws of Kenya (now repealed by the Land Registration Act 2012). According to the Preamble, the legislation was enacted to make further and better provision for the registration of land and for the regulation of land so registered.
[90] Cap 281 Laws of Kenya (now repealed by the Land Registration Act 2012).
[91] Government Land Act (note 39 above).
[92] Land Titles Act (note 47 above).

by Africans under African customary law and provided for absolute ownership to the registered proprietors of the land.[93] Additionally, the RLA emphasised on individual land tenure and followed the system of adjudication, consolidation and registration of title to land that was modelled according to the recommendations in the Swynnerton Plan.[94] Though the RTA, GLA, LTA and RLA governed land after independence, the pieces of legislation did not seek to invest powers over control and management of land on popular institutions; instead, the power over control of land was concentrated on the presidency and the central government.[95]

Expropriation and alienation of land which were the basis of introduction of colonial laws and policies resulted in underlying tensions in the land question after independence.[96] The colonial framework for land did not change. The enormous powers vested on the Crown were subsequently vested on the president to hold in trust for the State. The GLA granted power to the president to make grants and dispositions to individuals and corporate entities.[97] The problem of landlessness intensified after independence. The unoccupied and underutilised land with natural fauna and wild game were earmarked for special purposes such as excavation, mining, game reserves, game parks, water and catchment areas.[98] Indigenous peoples such as the *Ogiek* and *Endorois* were deemed to be illegal occupants on government land.

4.4.1 The Independence Constitution

The 1969 Constitution (the independence Constitution)[99] was designed to protect the land rights of the Crown for the benefit of the settler community. The independent Constitution provided for protection from deprivation of property in the Bill of Rights.[100] It provided that

[93] Registered Land Act (note 89 above) Section 28. The Section provided that the rights of a proprietor, whether acquired on first registration or whether acquired subsequently for valuable consideration or by an order of the court shall not be liable to be defeated and shall be held by the proprietor free from all other claims and interests whatsoever.

[94] Okoth-Ogendo (note 16 above) 71-73. The individualisation of title was done through the processes of adjudication which determined the extent of the claims, consolidation which ensured that scattered interests to land were brought under one economically viable realm and registration which entailed that all interests were recorded in a land register.

[95] Kanyinga et al (note 30 above) 107.

[96] Ibid 106.

[97] The Government Land Act (note 39 above) Section 3.

[98] Gachagua (note 29 above) 158.

[99] Republic of Kenya *The Constitution of Kenya* (1969) No. 5 of 1969 (now repealed by the Kenyan Constitution 2010).

[100] Ibid Section 75.

'no property of whatever description could be taken away except in cases of compulsory acquisition of land by the government.' Section 75 of the independence Constitution provided that:

> …no property of any description shall be compulsorily taken possession of, and no interest in or right over property of any description shall be compulsorily acquired, except where the following conditions are satisfied, that is to say, the taking of possession or acquisition is necessary in the interests of defence, public safety, public order, public morality, public health, town and country planning or the development or utilisation of any property in such manner as to promote the public benefit; and (b)the necessity therefore is such as to afford reasonable justification for the causing of any hardship that may result to any person having an interest in or right over the property; and (c) provision is made by a law applicable to that taking of possession or acquisition for the prompt payment of full compensation.[101]

The implication of Section 75 of the Constitution was that land that had been wrongfully taken by the Crown from the Kenyan communities could not easily be restituted. The independence Constitution additionally provided for direct access to the High Court for determination of cases within the provisions of Section 75 and provided for the Chief Justice to make rules in respect of protection from deprivation of property.[102] The section was intended to protect the sanctity of private property that had been alienated from native communities.[103]

Bhalla observes that the new property relations in the independence Constitution created a strain on customary property relations in the sense that the power held by elders in property relations remained limited.[104] Bhalla also observes that the framers of the independence Constitution codified the right to property as a fundamental right with the intention of addressing the issue of foreign domination and exploitation native communities by the Crown.[105] Codification of property rights protected the holders of properties by making it difficult to reinstate land to the communities whose land had been alienated and forced out by the Crown.

The post-colonial legislation and constitutional provisions evolved into three categories of land. The first category consisted of government land previously known as the Crown land, the second category consisted of private land and the third category consisted of trust or

[101] Ibid.
[102] Ibid. Sub Section 2. Section 84 of the independent Constitution stipulated that any person was entitled to apply to the High Court for redress in case of violation of any of the rights and freedoms enshrined in the Constitution.
[103] RS Bhalla 'Property Rights, Public Interests and Environment' in C Juma & J.B Ojwang (eds) *In Land We Trust: Environment, Private Property and Constitutional Change* (1996) 72.
[104] Ibid.
[105] Ibid.

community land.[106] Upon repeal of the independence Constitution in 2010, land was classified as public, community or private in the tenure systems.[107] The classification of land in this manner limits adequate protection to inhabitants within informal settlements who may lack formal titles to the land they occupy. That aggravates the problem of forced evictions instead of mitigating it.

The independence Constitution did not provide any framework for protection from forced evictions. The Bill of Rights in the independence Constitution did protect socio-economic rights (SERs) but instead protected civil and political rights.[108]

4.4.2 The Constitution of Kenya 2010

The Constitution makes elaborate provisions on land and property and contains the Bill of Rights which recognises the right to housing.[109] The Constitution outlines that the people own land collectively as a nation, as communities and as individuals and that land should be used in a manner that guarantees security of land rights, sustainable and productive management of land resources and equitable access to land.[110] In addition, it recognises the right to property.[111]

The Constitution provides for a detailed Bill of Rights with elaborate rights and freedoms which include justiciable SERs.[112] The Constitution does not make reference to protection of individuals and communities from forced evictions. However, it protects SERs which are relevant for protection against forced evictions. They include housing,[113] property[114] and human dignity.[115]

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[106] Community land was previously known as trust land and was held in trust for the communities by the local authorities under Chapter IX of the independent Constitution and the Trust Land Act Cap 288 Laws of Kenya (now repealed by the Community Land Act 2016).

[107] Article 61 of the Constitution.

[108] The Constitution of Kenya (1969) (note 99 above). Chapter V provided for protection of fundamental rights and freedoms of the individual. The Bill of Rights did not contain SERs but contained political and civil rights

[109] Article 40 of the Constitution.

[110] Ibid Article 60.

[111] Ibid Article 43.

[112] Chapter 4 of the Constitution.

[113] Article 43 (1) b of the Constitution. It provides that 'every person has the right to accessible and adequate housing, and to reasonable standards of sanitation.'

[114] Ibid Article 40.

[115] Ibid Article 28. It provides that 'every person has inherent dignity and the right to have that dignity respected and protected.'

The Constitution defines a marginalised community to include an indigenous community that retained and maintained a traditional lifestyle and livelihood based on a hunter or gatherer economy.[116] The Constitution in an attempt to recognise the right to property for indigenous peoples and marginalised communities defines community land and further made provision that special intervention could be accorded to the minority communities, hunter and gatherer communities and forest dwellers.[117] A marginalised community includes a traditional community that has preserved its unique culture and identity from assimilation by other larger communities and an indigenous community that has retained and maintained a traditional lifestyle and livelihood based on a hunter or gatherer economy whether pastoralist or settled in a specific place.[118]

The following section discusses the State duties relating to housing rights and the right to property under the Constitution as important components of protection of land rights and protection against forced evictions in Kenya.

4.4.3 State Duties Relating to Housing Rights as Imposed by the Constitution

Article 43(1) (b) of the Constitution provides that every person has the right to accessible and adequate housing and to reasonable standards of sanitation. The Constitution also states that the Bill of Rights is integral in the democratic space of Kenya for social, economic and cultural policies.[119] It provides that State and State organs should observe, respect, protect, promote and fulfil the rights in the Bill of Rights.[120] Article 43 is supposed to be read together with Article 21 (2) of the Constitution which provides that:

> … the State shall take legislative, policy and other measures, including the setting of standards, to achieve progressive realisation of the rights guaranteed under Article 43.

The right to housing which is a key component in protection from forced evictions is among the rights enumerated in Article 43. The provision that the State should set standards implies that the programmes intended to address the right to housing should be bench-marked against international norms and standards. The provision in Article 43 (1) (b) aligns with the

[116] Ibid Article 260.
[117] Article 63 of the Constitution defines community land as land lawfully registered in the name of group representatives, land lawfully transferred to a specific community by any process of law and land declared to be community land by an Act of parliament. The Constitution further mandated parliament to enact legislation to give effect to Article 63 on the provisions on community land.
[118] Ibid.
[119] Article 19 (1) of the Constitution.
[120] Ibid Article 21 (1).

substance in Article 11 of the ICESCR. The provision has been interpreted by the CESCR as the right to live somewhere in security, peace and dignity.[121] The right also entails 'adequate privacy, space, security, lighting and ventilation, basic infrastructure and location with regard to work and basic facilities, all at a reasonable cost.'[122]

The Constitution obligates the State to enact enabling legislation in fulfilment of the international human rights obligations.[123] Despite this provision, Kenya has not enacted legislation to fulfil its international obligations on the right to housing and this has enhanced systemic forced evictions. Murimis argues that lack of legislation and policies to safeguard housing rights is a violation of the Constitution.[124] Forced evictions jurisprudence demonstrates that Kenya lacks legislation and appropriate policies to guarantee the right to housing, an integral component for protection from forced evictions.[125]

The Constitution obligates the State to enact legislation and adopt measures to achieve the progressive realisation of the right of access to adequate housing.[126] In the event that the State claims that it does not have the resources to implement the right to housing, the Constitution has provided guidance to courts, tribunals or other authorities to rely on three principles. The first principle is that the State should demonstrate that the resources are not available.[127] Secondly, the State should prioritise measures that facilitate enjoyment of the right or fundamental freedom having regard to prevailing circumstances which include the vulnerability of particular groups or individuals.[128] Thirdly, the State, courts, tribunals and other authorities should not interfere with decisions by the relevant State organ concerning the allocation of available resources, solely on the basis that it would have arrived at a different conclusion.[129]

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[121] UN CESCR General Comment No. 4 'The Right to Adequate Housing' (1991) UN Doc No. E/1992/23 Para 7.

[122] Ibid.

[123] Article 21 (4) of the Constitution.

[124] EK Murimi 'Slum Upgrading in Kenya: A Double-Edged Sword for the Right to Adequate Housing' (2018) 14(1) *Law Society of Kenya Journal* 98-99.

[125] *Satrose Ayuma & 11 others v Registered Trustees of the Kenya Railways Staff Retirement Benefits Scheme & 3 Others* High Court of Kenya at Nairobi Petition No. 65 of 2010 and (2013) eKLR. For the comprehensive analysis of the case, see Chapter 2 Section 2.2.1.2, *Mitu-Bell Welfare Society v Attorney General & 2 Others* (2013) eKLR and the ACPHR *Centre for Minority Rights Development on behalf of the Endorois Community v Kenya* 276/2003.

[126] Article 21(2) of the Constitution.

[127] Ibid Article 20 (5) (a).

[128] Ibid Article 20 (5) (b).

[129] Ibid Article 20 (5) (c).

Franceschi and Lumumba observe that the State cannot realise the right to housing among other SERs immediately because of financial resources constraints.[130] However, they assert that the Constitution has set out principles that guide courts, tribunals and other authorities in determining the minimum standards for achieving the rights despite having limited financial resources.[131] Considering South African jurisprudence in application to the Kenyan context, the Constitutional Court in *Government of the Republic of South Africa and Others v Grootboom and Others*[132] ruled that the State should support legislation with appropriate policies and programmes to safeguard the right to housing and protect from arbitrary evictions.[133] In demonstrating the nature of the policies and programmes that States are obligated to initiate, the Court stated that:

> …policies and programmes must be reasonable, both in their conception and their implementation. The formulation of a programme is only the first stage in meeting the obligations of the State. The programme must also be reasonably implemented. An otherwise reasonable programme that is not implemented reasonably will not constitute compliance with the obligations of the State.[134]

The essence of progressive realisation is that courts can demand explanation by the State on the steps that have been taken to fulfil SERs and specifically the right to housing, a component of protection from arbitrary evictions. The courts can also require the State to account for the progress made in implementation of the right.[135] The right also entails protection from forced evictions and destruction to property. It also includes freedom from interference with an individual's home, family and privacy.[136]

The entitlements in respect of the right to housing and other SERs are categorised into positive and negative rights.[137] According to Ojwang, the positive rights require policy, programme and administrative action by the State to progressively ensure their realisation.[138] The negative category of rights is safeguarded by requiring State organs to desist from any trespassing action against them.[139] As a positive right, the right to housing requires the State

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[130] L Franceschi & PLO Lumumba *The Constitution of Kenya: A Commentary* (2019) 202.
[131] Ibid.
[132] (2001) (1) SA 46 (CC) Para 42.
[133] Ibid. The court reiterated that the programmes initiated by the State must also be reasonably implemented.
[134] Ibid.
[135] J Brickhill & N Ferreira 'Socio-Economic Rights' in I Currie & J De Waal *The Bill of Rights Handbook* 6 ed (2018) 575.
[136] Ibid 3-4.
[137] JB Ojwang *Ascendant Judiciary in East Africa: Reconfiguring the Balance of Power in a Democratizing Constitutional Order* (2013) 38.
[138] Ibid.
[139] Ibid.

to progressively ensure its realisation through policy, administrative and legislative measures to ensure its realisation.

There are several misconceptions regarding the components of the right to housing. The right does not impose an obligation to the State to build houses for the entire population.[140] The right to housing does not prohibit development projects which require evictions of people.[141] In instances where forced evictions are inevitable, it should be carried out in accordance with international human rights standards. The right to adequate housing is also not the same as the right to land and property.

4.4.3.1 The Nature of Responsibilities/ Duties

The obligations imposed by human rights instruments relating to SERs, imposes duties on the State which include the obligations to respect, protect and fulfil the right to housing.[142] The typology of State duties of 'respect, protect, and fulfil' has been adopted as a framework for analysis by the supervisory bodies under international human rights treaties particularly the Committee on Economic Social and Cultural Rights (CESCR) which supervises obligations under the International Covenant on Economic, Social and Cultural Rights (the ICESCR).[143] The negative duty that is imposed by the right to housing is an important component in the prevention against arbitrary evictions.

The Constitution provides that State organs created to observe, protect, promote and fulfil the rights in the Bill of Rights.[144] The Constitution further obligates the State 'to take legislative, policy and other measures, including the setting of standards, to achieve the progressive realisation of SERs guaranteed under Article 43.'[145] The implication of the provision is that the State is not only obligated to refrain from enjoyment of rights but must also act to protect, enhance and realise their enjoyment.[146] The obligation of the State is elaborated in typologies namely the duty to respect, protect and fulfil the rights contained in the Bill of Rights.[147]

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[140] UN Habitat *The Right to Adequate Housing* (2012) Fact Sheet No 21/Rev 1 <ohchr.org > accessed 26 March 2021 [6].
[141] Ibid.
[142] S Liebenberg *Socio-Economic Rights Adjudication under a Transformative Constitution* (2010) 83.
[143] International Covenant on Economic, Social and Cultural Rights (1966) UN Doc A/6316.
[144] Article 21 (1) of the Constitution.
[145] Ibid Article 21 (2).
[146] AM Mumbi 'Constitutional Protection of Socio-Economic Rights in Kenya and South Africa: A Comparative Analysis' in JO Ambani (ed) *Judiciary Watch Report: Readings on the Rule of Law in Africa* (2008) 164.
[147] Ibid 163.

Pursuant to the typologies of State obligations, the Constitution has established courts as institutions that facilitate the realisation of SERs and protect individuals and communities from forced evictions. These duties are fully discussed below, including highlighting their importance in the protections against eviction.

4.4.3.1.1 The Obligation to Respect

The duty to respect requires the State and non-state actors to refrain from direct or indirect interference with the enjoyment of the right to housing. The duty requires the State to respect freedoms, autonomy and resources of the right-holders.[148] The State should respect SERs for individuals alone or in any form of association with others and further respect the resources belonging to groups.[149] The UN Habitat has elaborated the duty to respect by stating that:

> …states and non-state actors should refrain from carrying out forced evictions and demolishing homes, denying security of tenure to particular groups; imposing discriminatory practices that limit women's access to and control over housing, land and property; infringing on the right to privacy and protection of the home; denying housing, land and property restitution to particular groups; or polluting water resources.[150]

In *Ibrahim Sangor Osman and the 1 122 Evictees of Medina Location, Municipal Council of Garissa v The Minister of State for Provincial Administration & Internal Security and Others,*[151] the High Court observed that the State bore the duty to respect the right to adequate housing and prohibit forced evictions. The High Court emphasised consultation with the affected community and all workable alternatives to eviction as key components of the duty to respect the right to housing.[152] The High Court also observed that there was no genuine consultation between State officials and the affected persons and groups.

4.4.3.1.2 Obligation to Protect

The obligation to protect requires States to take measures that prevent third parties from interfering with the right to housing.[153] It requires the legislature to enact protective legislation and the executive arms of government to put in place policy and administrative measures to enhance its realisation. The obligation to protect also entails protecting the right

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[148] *Social and Economic Rights Action Centre and the Centre for Economic and Social Rights v Nigeria* (*SERAC* case) Communication No. 155/96 (2001) Para 45.
[149] Ibid.
[150] UN Habitat 2012 (note 140 above) 33.
[151] Constitutional Petition 2 of 2011(eKLR).
[152] Ibid 6.
[153] UN CESCR General Comment No. 14 'The Right to the Highest Attainable Standard of Health' (2000) UN Doc E/C.12/2000/4 Para 33.

to housing from third parties being individuals, groups or corporations, from interfering in any way with the enjoyment of the right. It further obligates the State to adopt the necessary and effective legislative and other administrative measures restrain and sanction State and non-state actors from participating in forced evictions.[154]

In the *SERAC* case,[155] the African Commission on Human and Peoples Rights (the ACHPR)[156] held that the right to adequate housing as implicitly protected in the African Charter of Human and Peoples Rights also encompasses protection from forced evictions.[157] The ACHPR observed that forceful eviction, continued threats of eviction and failure to compensate the evictees was a dereliction of the duty to protect the evictees' right to housing.[158] The ACHPR observed that the State should protect right-holders through appropriate legislation and provision of effective remedies and further take measures to protect beneficiaries of the protected rights against political, economic and social interference.[159]

The Rent Restriction Act[160] comes close to uphold the obligation to protect the right to housing. The Act specifically deals with residential houses and imposes restrictions on landlords in order to protect tenants. Even though the Act has established a tribunal with defined powers to regulate rent and relations between landlords and tenants,[161] the penalties provided in the legislation cannot act as deterrence against those who abuse housing rights.[162] The fines and terms of imprisonment stipulated in the Act are minimal and do not deter occurrence of offences.[163]

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[154] UN Habitat 2012 (note 140 above) 33.

[155] The *SERAC* case (note 148 above).

[156] The ACPHR is established under Article 30 of the African Charter on Human and Peoples Rights with the mandate of promotion and protection of human rights in Africa. It was officially inaugurated on 2 November 1987.

[157] Ibid Para 52.

[158] Ibid Para 63.

[159] Ibid Para 46.

[160] Cap 296 Laws of Kenya.

[161] Ibid Sections 4-8. The Act establishes a tribunal with the mandate to assess the standard rent of any premises, to fix rent, to apportion rent among tenants sharing residences, permit distress for rent and investigate complaints by landlords and tenants and address them.

[162] I Ndegwa 'A Roof over Wanjiku's Head: Judicial Enforcement of the Right to Housing under the Constitution of Kenya' in *Judicial Enforcement of Social-economic Rights under the New Constitution: Challenges and Opportunities for Kenya* (2011) 162-163.

[163] Rent Restriction Act (note 160 above). Section 7 stipulates that 'anyone who fails to comply with any lawful order or decision of the tribunal after the expiration of the time allowed for an appeal shall be guilty of an offence and liable to a fine not exceeding two thousand shillings or to imprisonment for a term not exceeding six months, or to both such fine and imprisonment.'

4.4.3.1.3 Obligation to Fulfil

The obligation to fulfil obligates States to adopt appropriate legislation and take administrative, judicial and promotional measures towards the full realisation of the right to housing.[164] The obligation also requires States to progressively prevent and address homelessness with the available resources.[165] In the SERAC case, the ACHPR observed that the State should fulfil the international obligations that it freely undertakes under the various human rights regimes.[166] The State should fulfil its obligation by moving its machinery towards the actual realisation of the right.[167]

The UN Habitat has elaborated this obligation to include adoption of a national housing policy or a national housing plan that defines the objectives for the development of the housing sector with special focus on marginalised groups by identifying the resources available to meet these goals.[168] The duty to fulfil is important because the State outlines the time frame for the implementation of the necessary measures to implement the right to housing which ensures adequate remedies for forced evictions.

The following part discusses the right to property under the Constitution.

4.5 The Right to Property under the Constitution

Protection of the right to property is a fundamental aspect in protection from arbitrary evictions and safeguarding the right to housing. The right to property can be utilised as a bulwark against arbitrary evictions in the Kenyan context. The right to property as entrenched in the Constitution has a potential instrumental value in the fight against arbitrary evictions.

The Constitution protects the right to acquire and own property of any description in any part of the country and protects the right to possession and enjoyment.[169] Article 40(1) of the Constitution provides that parliament shall not enact laws that arbitrarily deprive a person of property of any description and in any way limit or restrict the enjoyment of the right to property.[170] The Constitution further obligates the State not to deprive any person of property

[164] UN Habitat 2012 (note 140 above) 32.
[165] Ibid 33.
[166] The *SERAC* case (note 148 above) Para 44.
[167] Ibid Para 47.
[168] UN Habitat 2012 (note 140 above) 33-34.
[169] Article 40 (1) of the Constitution.
[170] Ibid Article 40 (2).

of any description or any interest in property unless the deprivation is as a result of acquisition of land for public purpose and in such cases, prompt and adequate compensation must be made.[171] The Constitution further defines property to include 'any vested or contingent right to, or interest in or arising from land, or permanent fixtures on, or improvements to, land'[172]

The High Court has balanced between the right to property on one hand and protection of individuals from forced evictions on the other. In the case of *Symon Gatutu Kimamo & 587 Others v East African Portland Cement Company Limited (EAPCCL),*[173] the High Court addressed the problem of forced evictions within the lens of the right to property. The applicants claimed title to land under adverse possession under Section 38 of the Limitation of Actions Act.[174] The suit property was registered in the name of EAPCCL. The applicants claimed that they had been in possession of the property for a continuous, open, and uninterrupted period exceeding 12 years and as such, they had acquired an overriding interest over the land under the doctrine of adverse possession.[175]

EAPCCL denied that the applicants had been in actual possession of the property for a period of more than 12 years and claimed that they had always attempted to remove persons who encroached on that parcel of land.[176] The applicants alleged forceful eviction from the land though the EAPCCL denied the allegation.

In addressing the aspect of forced evictions of the applicants from the land, the High Court observed that forced evictions are illegal under Kenyan law.[177] The High Court however clarified that prohibition against forced evictions does not imply liberty of persons to settle on whatever land they wish and plead prohibition against forced eviction in reply to demands to leave.[178] The High Court emphasised on that position as follows:

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[171] Ibid Article 40 (3).
[172] Ibid Article 260.
[173] (2011) eKLR.
[174] Cap 22 Laws of Kenya. Section 38 of the Act provides that 'where a person claims to have become entitled by adverse possession to land registered under any of the Acts cited in Section 37, or land comprised in a lease registered under any of those Acts, he may apply to the High Court for an order that he be registered as the proprietor of the land or lease in place of the person then registered as proprietor of the land.'
[175] The *Symon Gatutu Kimamo* case (note 173 above) Para 14.
[176] Ibid Para 21.
[177] Ibid.
[178] Ibid Para 52.

> …forced evictions are illegal under our laws, and especially, under our Constitution. It matters not whether one has title to the property in question. It matters not that the title holder is the government or a government entity. It matters not if the title holder believes the intended evictee is a trespasser who has no colour of title. Indeed, the prohibition against forced evictions applies with stronger force against the government. This is the position under our own municipal law as well as the position under international law which is now part of our law under Article 2(5) and 2(6) of our Constitution. [179]

According to the High Court, the applicants did not persuade the court that they had been in possession of the suit property adverse to the respondent for more than 12 years.[180] The High Court declined to give the reliefs sought by the applicants. Even though the High Court opined that the applicants were not authorised to occupy the land owned by EAPCCL, the High Court considered international best practices that provide procedural protection and due processes that are essential aspects in respect of forced evictions.[181]

The case is significant in protection against forced evictions because the High Court balanced between protection of the right to property and protecting inhabitants of the land against forced evictions. Even though the High Court did not uphold the claim for adverse possession of the applicants, it found that the continued evictions by the respondent were against international standards that protect individuals from forced evictions. The case elaborates the essence of following the procedural requirements as stipulated in General Comment No. 7 are followed in eviction procedures.[182] The substantive and procedural guidelines are a remedy to the lacuna in the Kenyan law on evictions.

The following section evaluates relevant legislations that govern evictions in Kenya. The section also evaluates the limitations of the community land legislation in protecting communities from forced evictions.

4.6 Legislation that Protect against Forced Evictions in Kenya

4.6.1 Land Laws (Amendment) Act

The Land Act (the LA)[183] did not provide for protection from forced evictions on its enactment. In 2016, LA was amended through the Land Laws (Amendment) Act (the

[179] Ibid Para 51.
[180] Ibid Para 43.
[181] Ibid Paras 56 & 59.
[182] UN CESCR General Comment No. 7 'The Right to Adequate Housing (Art.11.1): Forced Evictions' 20 May 1997 UN Doc E/1998/22.
[183] Act 6 of 2012.

LLAA)[184] to introduce procedural provisions in an attempt to protect against forced evictions. The LLAA defines eviction as 'the act of depriving or removing a person from the possession of land or property which they hold unlawfully either executed upon a successful law suit or otherwise.'[185] The LLAA provides that anyone is prohibited from unlawfully occupying private, community or public land and further provides for eviction of unlawful occupiers.[186]

The LLAA further prescribes the persons or institutions responsible for serving notices for evictions in respect of public land,[187] community land[188] and private land.[189] The procedural requirements for evictions include the requirement that the notice should be in writing in an official language, published in at least two daily newspapers in case of large groups and notification of the local administration and the police.[190] The affected persons have the right to seek legal redress from the court.

The LLAA also provides for proper identification of persons carrying out evictions, possession of formal authorisation and presence of government officials during eviction.[191] Evictions are further supposed to be carried out in a manner that respects dignity, right to life and protects the vulnerable members of society.[192] It prohibits arbitrary deprivation of property or possessions as a result of evictions and encourages the government to devise mechanisms that would help protect property from destruction and provide affected persons with the first priority to salvage their property.[193]

The LLAA defines an unlawful occupier as a person who, without lawful authority or without any right or licence, under customary or statutory land law occupies, or erects any building on or cultivates or engages in grazing on public land.[194] It further provides that persons shall

[184] Act 28 of 2016.
[185] Ibid Section 2.
[186] Ibid Sections 152A and 152B.
[187] Ibid Section 152C. It provides that the National Land Commission is responsible for serving unlawful occupiers of public land with eviction notices.
[188] Ibid Section 152D. It provides that the County Executive Committee Member responsible for service of eviction notices for unlawful occupiers of unregistered community land.
[189] Ibid Section 152E (1). It provides that the registered proprietor is responsible for service of eviction notices to unlawful occupiers of private land.
[190] Ibid Section 152E (2).
[191] Ibid Section 152G.
[192] Ibid.
[193] Ibid.
[194] Ibid Section 155.

not unlawfully occupy private, community or public land and in case they occupy any of the categories of land, they shall be evicted.[195]

Even though LLAA mentions the three categories of land, it lays emphasis on the procedure for eviction on public land and not private and community land. The County Executive Committee Member (CECM) within the county government responsible for land matters is responsible for notifying affected people of eviction from unregistered community land in writing or by notice in the gazette. LLAA also mandates the CECM to publish the notice in a local daily newspaper that has a nationwide circulation and by radio announcement, in a local language, where appropriate, at least three months before the eviction.[196]

With respect to evictions from private land, the owner is allowed to issue a notice of not less than three months to the illegal occupiers of land in writing and in a national and official language, in case of a group, the notice should be in a local daily newspaper that has a nationwide circulation and by radio announcement.[197] LLAA further provides that terms and conditions for removal of buildings, the harvesting of growing crops should be specified and should be served upon the local administration.[198]

The mandate to issue notices for eviction on public land in Kenya is bestowed upon the National Land Commission (the NLC).[199] The LLAA states that if the NLC is of the opinion that a person is in unlawful occupation of public land, it may serve on that person a notice in a prescribed form.[200] The NLC may also communicate orally in a language understood by the unlawful occupiers requiring them to demonstrate why they should not be required to vacate the land within any time and subject to any terms and conditions determined by the NLC.[201]

The notice is further intended to inform the person to whom it is addressed that the person has a right to be heard in connection with showing cause as to why the person should not vacate the land to which the notice relates.[202] The NLC is supposed to consider the use which

[195] Ibid Section 152A and 152B.
[196] Ibid Section 152D.
[197] Ibid Section 152E.
[198] Ibid.
[199] The National Land Commission is established under Article 67 of the Constitution of Kenya. The functions of the Commission include managing public land on behalf of the national and county governments, to initiate investigations into present or historical land injustices, and recommend appropriate redress, to recommend a national land policy to the national government among other roles.
[200] LLAA (note 184 above) Section 155 (2) and Section 152C.
[201] Ibid.
[202] Ibid Section 155(3).

the person is making of the land, the length of time that person has been on that land, the person's age, whether the affected persons have dependants living on the land, whether the occupation of the land is preventing some necessary or desirable development or public works among other factors.[203]

The LLAA does not make provision for obtaining a court order before eviction is carried out. However, Angote argues that adequate and reasonable eviction notice is important since it gives the affected persons an opportunity to seek redress in court for relief against such notice.[204] The provision for notice requires that it is made in a prescribed form to be prescribed by the Cabinet Secretary for land matters.

The LLAA provides that any person or persons served with an eviction notice may apply to court for relief against the notice.[205] The court may confirm the notice and order the person to vacate, make alterations to the notice on such terms as it deems equitable and just, suspend the operation of the notice for any period which the court shall determine and may order for compensation.[206] The LLAA does not contain an express provision that requires a court to consider all the relevant circumstances before ordering the eviction of applicants.

The LLAA prescribes that the notice should be served on the affected parties through the police and local administrators and be placed in at least five strategic places.[207] It is possible that the affected people may not be made aware of the notice and may not be in a position to seek redress from court. The notice for eviction as described in the LLAA is not adequate and does not offer adequate guarantee for protection from forced evictions. Forced evictions done without notice disproportionately victimised people especially when executed at odd hours.[208] However, courts are mandated to confirm notices and order the affected people to vacate, cancel, vary, alter or make additions to the notice on such terms as it deems equitable and just, suspend the operation of the notice and/or order for compensation.[209]

[203] Ibid Section 153 (4) a-j.
[204] OA Angote 'Evictions in Kenya: Which Way under the New Constitution and the Land Laws (Amendment) Act 2016?' (2018) 2(2) *Journal of Conflict Management and Sustainable Development* 79.
[205] LLAA (note 184 above) 152F (1).
[206] Section 152F (2).
[207] Ibid Section 152F.
[208] K Otiso 'Forced Evictions in Kenyan Cities' (2002) 23 (3) *Singapore Journal of Tropical Geography* 261.
[209] LLAA (note 184 above) Section 152F.

The LLAA empowers the NLC to make decisions relating to eviction from public land.[210] The NLC is supposed to notify all affected persons, in writing, by notice in the Kenya Gazette and in one newspaper with nationwide circulation and by radio announcement for at least three months before the eviction.[211] Eviction notices in respect to unlawful occupiers of community land are effected by the CECM in respect of private land, the LLAA provides that the owners or the persons in charge are empowered to issue notices.[212] The LLAA does not however provide for meaningful engagement with the affected people before forced evictions are carried out.

The LLAA does not give a clear definition of what comprises an illegal occupier within public, private and community lands. However it provides for the parties concerned in giving notices for eviction in respect of public, private and community land. Since LLAA fails to clearly give parameters for illegal occupation and fails to provide for requirements for a court order and taking into consideration all the relevant circumstances, the process may be prone to abuse and make individuals and communities vulnerable to evictions.

4.6.2 The Fair Administrative Action Act

The Fair Administrative Action Act (the Act) gives effect to Article 47 of the Constitution which provides for fair administrative action.[213] The Act defines administrative action to include the powers, functions and duties exercised by authorities and quasi-judicial tribunals.[214] Administrative action also includes acts, omissions or decisions of any person, body or authority that affects the legal rights or interests of any person to which it relates.[215] The Act provides that every person has the right to expeditious, efficient, lawful, reasonable and procedurally fair administrative action.[216]

In the event administrative actions are likely to adversely affect the rights and fundamental freedoms, the Act provides for prior and adequate notice for proposed administrative action.[217] The Act provides for an opportunity to be heard, the right of appeal, legal

[210] Ibid Section 152C.
[211] Ibid Section 152D.
[212] Ibid Section 152E.
[213] Act 4 of 2015. See the preamble. Article 47(1) of the Constitution provides that 'every person has the right to administrative action that is expeditious, efficient, lawful, reasonable and procedurally fair.'
[214] Ibid Section 2.
[215] Ibid.
[216] Ibid Section 4.
[217] Ibid Section 4(1).

representation, an opportunity to consider all relevant facts and to provide reasons for the proposed administrative action proposed in the notice.[218] The Act further provides that for any administrative action affecting the legal rights of a particular group, the administrator is mandated to issue public notices for attendance of the affected parties which gives reasons for the administrative action intended to be taken.[219] Finally, persons affected by administrative actions may institute proceedings for the review of such actions.[220]

4.6.3 The Community Land Act

The Community Land Act (CLA)[221] is important in considering the extent to which Kenyan law has protected indigenous peoples and communities from forced evictions. CLA adopts a general definition of community. It defines a community as a distinct organised group of users of community land who share a common ancestry, ethnicity, unique mode of livelihood, similar common interest, ecological space and geographical space.[222]

CLA aims at recognition, protection and registration of community land.[223] CLA provides for management and administration of community land and further provides for the role of county or devolved governments in relation to all unregistered community land.[224] The definition incorporates indigenous communities and seeks to entitle them to protection. The definition is guided by the Constitution which mandates the State to take policy measures and to enact legislation to redress the disadvantages that have been suffered by individuals or groups because of past discrimination.[225] The State is also obligated to adopt affirmative action programmes that are designed to ensure that minorities and marginalised groups can participate in governance, develop their cultural values, languages and practices and have reasonable access to essential amenities such as water, health services and infrastructure.[226]

CLA provides protection to communities in so far as issuing formal documents for ownership of land. However, the Act does not recognise the indigenous peoples in Kenya as special minority groups. CLA also further failed to adopt and incorporate the provisions in the UN

[218] Ibid.
[219] Ibid Section 5(1).
[220] Ibid Section 7.
[221] Act 27 of 2016.
[222] Ibid Section 2.
[223] Ibid Preamble.
[224] Ibid.
[225] Article 27 (4) of the Constitution.
[226] Ibid Article 56.

Declaration on the Rights of Indigenous Peoples.[227] The Declaration addresses issues related to the right to lands, territories and resources of indigenous peoples. Although it is not a legally binding instrument, it has a persuasive value in respect of conduct of States towards indigenous people.

CLA was intended to provide an opportunity to address the land rights concerns faced by indigenous peoples. The ACHPR recommended recognition of the rights of ownership and restitution of the *Endorois* ancestral land. The ACHPR further recommended that the Kenyan government give unrestricted access to Lake Bogoria and surrounding sites for religious and cultural rites and for grazing their cattle.[228] CLA fails to address the issues that had historically undermined the land rights of indigenous peoples as observed by the ACHPR. CLA also fails to address the problem of forceful evictions of indigenous communities from their land. Even though CLA intends to register communities as landowners through freehold or leasehold tenure, it may not benefit indigenous peoples who have consistently been forcefully evicted from their lands. Without restitution of the land to the indigenous peoples, CLA does not protect their plight.

CLA has not addressed the concern regarding free, informed and prior consent of indigenous communities prior to exploration of natural resources in their ancestral land. Indigenous communities are also entitled to equitable sharing of benefits accrued from exploration and exploitation of extractives found in their land.[229] The indigenous communities are also entitled to full compensation in case of adverse environmental impact of their land, livelihoods and natural resources arising from economic activities.[230]

CLA does not recognise hunter and gatherer communities in Kenya as indigenous. The indigenous peoples are distinct based on their unique way of life. Even though CLA and its implementing regulations were intended to empower communities to have greater control of their land and natural resources, its failure to recognise the hunter and gatherer communities

[227] UNGA 'United Nations Declaration on the Rights of Indigenous Peoples' (2011) UN Doc A/RES/66/142. The Declaration was adopted on 19 December 2011. See the Report of the African Commission's Working Group on Indigenous Populations/ Communities *Extractive Industries, Land Rights and Indigenous Populations'/Communities' Rights, East, Central and Southern Africa* (2017) adopted by the African Commission on Human and Peoples Rights at its 58th Ordinary Session April 2016, The Gambia 105-106. The Working Group recommended that the community land legislation should adopt international best practice provided for in the UNDRIPs concerning indigenous peoples.'

[228] The *Endorois* case (note 125 above) Para 298.

[229] Report of the African Commission's Working Group on Indigenous Populations/ Communities (note 226 above).

[230] Ibid.

is a shortcoming in the law. CLA as the sole legislation that protects the land rights of communities in Kenya is deficient in protecting peoples from forced evictions. CLA fails to put in place procedural safeguards in the protection against evictions. CLA should provide for prior informed consent with communities for any commercial activities or otherwise that affect communities given their vulnerability to arbitrary evictions. Infusing the principle of prior informed consent in legislation would better protect the rights of indigenous peoples and rural communities.

The following section discusses the national policy framework on forced evictions and housing.

4.7 The National Policy Framework on Forced Evictions and Housing

Policy initiatives can be an important component in protection against forced evictions as they provide interpretative guidance to both the courts and administrators. Policy initiatives are undertaken by the executive arm of the government and inform enactment and amendment to legislation. The Constitution obligates the State to take policy measures, enact appropriate legislation to achieve the progressive realisation of the rights guaranteed under Article 43.[231]

There is no clear policy that addresses the problem of forced evictions. The policy documents discussed contain only scattered general statements on the intention of the State to address the problem of forced evictions and protect the right to housing. The policy documents relevant to forced evictions and the right to housing include the guidelines on evictions and settlement, the land policy and housing policy. These are discussed below.

4.7.1 Evictions and Resettlement Guidelines 2009

The Ministry of Lands, Housing, Public Works and Urban Development (MLPWHUD)[232] developed Evictions and Resettlement Guidelines in 2009.[233] The aim of the guidelines was to facilitate and guide the enactment of legislation to regulate evictions. The guidelines were informed by the fact that forced evictions were prevalent since the government had carried out large-scale forced evictions especially in informal settlements thereby contravening

[231] Article 21(2) of the Constitution. Article 43 of the Constitution provides for SERs.
[232] Republic of Kenya *Executive Order No. 1: Organisation of the Government of the Republic of Kenya* (2022) 23.
[233] Republic of Kenya *Eviction and Settlement Guidelines: Towards Fair and Justifiable Management of Evictions and Resettlements* (2009).

international human rights standards.[234] The guidelines elaborated the problem of forced evictions in Kenya and states that:

> … for decades, the Kenyan Government has carried out large-scale forced evictions especially in informal settlements, contravening international human rights standards. Mass forced evictions have usually involved government projects or private developers claiming ownership of land on which some of the settlements stand. Government bulldozers are used to evict residents and demolish their homes with little or no notice and no efforts are made to resettle or compensate residents. Families are made homeless and many are left without livelihoods when their small businesses are destroyed. Documented evidence shows that forced evictions affect the livelihoods of individuals and households and always have a devastating impact and sometimes loss of livelihood on individuals and households. This calls for a legislative framework and guidelines to direct evictions, especially for "development-based" evictions.[235]

The guidelines provide that forced evictions are illegal and unjust and an affront to economic growth and development.[236] The guidelines also provide for procedures on how to address inevitable evictions by providing alternative resettlement at the expense of the State.[237] Additionally, the guidelines provide that the government is obligated take into account the plight of the marginalised groups including women, children, people living with disability, people living with HIV and AIDS the elderly, and illiterate persons who are entitled to relevant information and the right to full participation during the entire process of eviction.[238]

The guidelines adopted the procedures in General Comment No. 7.[239] The guidelines provide for appropriate notice to the affected individual or groups on the day and time of the eviction, consultations with the affected individual or group on the proposed eviction modalities and resettlement plans.[240] The guidelines further provide for public hearing with affected persons on proposals for resettlement and opportunity for the parties to seek legal redress in case of a dispute.[241] Most importantly, the guidelines recognised the need for legislative measures prohibiting evictions without a court order.[242] These procedures in the guidelines are significant in the protection against evictions and have been embraced significantly by some the courts.[243] However, the enforcement mechanism has not been sufficient.

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[234] Ibid 2.
[235] Ibid
[236] Ibid 37.
[237] Ibid 36
[238] Ibid.
[239] General Comment No. 7 (note 182 above) Para 15.
[240] The Eviction and Settlement Guidelines (note 233 above) 35-36.
[241] Ibid.
[242] Ibid 37.
[243] Ibid.

The guidelines provide for mediation in the event the alternatives provided by the government are not acceptable to the affected persons. The mediation committee should consist of representatives of the affected persons and representatives from MLPWHUD and the Kenya National Commission on Human Rights.[244] The guidelines further provides that the government should adopt legislative measures prohibiting any such eviction without a court order which is supposed to consider all the relevant circumstances of affected persons, groups and communities in accordance with internationally recognised human rights.[245]

4.7.2 The National Land Policy

The National Land Policy (the Policy) was adopted by parliament in December 2010. The Policy comprises an overall framework and set of principles to guide sectoral, legislative and institutional reforms in land administration and management.[246] The legal status of the Policy is that it is not a permanent policy. The Policy provides that it will be reviewed after every ten years to take into account current and future needs in view of social and economic dynamics in the land sector.[247] However, the Policy has not been reviewed to date.

The Policy was formulated with the aim of securing land rights, providing for sustainable growth, investment and the reduction of poverty in line with the government's overall development objectives.[248] The Policy was also aimed at offering a framework of policies and laws designed to ensure opportunities to access and beneficially occupy land and provide efficient and effective utilisation of land and land-based resources.[249] The Policy identified forced evictions and inadequate and inaccessible housing as key problems.

The Policy further recognised that the institutional framework for land administration and management was centralised, complex and exceedingly bureaucratic making it prone to corruption and inefficiency.[250] It proposed to reform the institutional framework in order to facilitate efficient, cost-effective and equitable management of land and land based resources.[251]

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[244] Ibid. The KNCHR was established by Act 14 of 2011.
[245] Ibid 37.
[246] Ibid 3.
[247] Ibid.
[248] Republic of Kenya *Sessional Paper No 3 of 2009 on National Land Policy* (2009) 1.
[249] Ibid.
[250] Ibid.
[251] Ibid Para 228.

With regard to the problem of forced evictions, the Policy recommended establishment of an appropriate legal framework for eviction based on internationally acceptable guidelines.[252] It also recognised that many Kenyans live in informal settlements due to lack of security of tenure. It proposed setting aside serviced land for housing development for the poor at affordable rates and regulating the disposal of land allocated to people living within informal settlements.[253]

The Policy also sought to secure the land rights of indigenous hunter and gatherer communities. It recognised that current laws and policies had deprived many Kenyans of access to land and the disruption of indigenous culture and conservation systems.[254] The Policy further aimed at recognition and protection of the rights of indigenous peoples' rights to access forests, water and other natural resources and also facilitate their access, co-management and derivation of benefits from the resources.[255]

The Policy is significant in the protection against forced evictions because it acknowledges the prevalence of forced evictions in Kenya. The formulation of the Policy indicates that the government had realised the extent of the problem. Even though the Policy recommended enactment of an appropriate legal framework for eviction based on internationally acceptable guidelines, it did not develop specific policy strategies to address the problem of forced evictions.

4.7.3 National Land Use Policy

The National Land Use Policy (NLUP) was adopted by parliament in 2017 and aims at ensuring sustainable utilisation of land and to provide guidelines for land use planning, resource allocation and resource management.[256] The NLUP comprises an overall framework and a set of principles to guide land use management. The key objective of the NLUP was to provide a legal, administrative, institutional and technological framework for optimal utilisation of land and land related resources in a sustainable manner at national and local levels.[257] The legal status of NLUP is that it is not a permanent policy. The NLUP is to be

[252] Ibid Para 229.
[253] Ibid Para 211 (l) & (m).
[254] Ibid Para 31.
[255] Ibid Para 96 (j).
[256] Republic of Kenya *National Land Use Policy* (2016) 1.
[257] Ibid 9.

reviewed every ten years in order to take into account current and future needs in view of social economic dynamics of development.[258]

A fundamental provision in the NLUP relevant to this study is the right to housing within public private partnerships in provision of low income housing in order to address the rise in population growth and distribution.[259] The NLUP further proposed formulation of a comprehensive national plan for low income and high density housing which would benefit low income earners.[260] More importantly, the NLUP proposed to develop strategies to increase the housing stock in urban and rural areas, enhance poverty alleviation strategies to meet housing needs and create an enabling environment for public private partnerships in the housing sector.[261] These recommendations in NLUP are significant as important components in the protection against forced evictions.

4.7.4 The National Housing Policy

The State Department of Housing[262] has developed Housing Policies intended to facilitate provision of affordable housing and addressing the problem of informal settlements. The Policies include Sessional Paper No. 5 of 1966/67,[263] the National Shelter Strategy to the Year 2000,[264] Sessional Paper No.3 of 2004,[265] and Sessional Paper No.3 of 2016[266] which were adopted after the enactment of the Constitution. The 2016 Housing Policy (the Policy) aims at ensuring progressive realisation of the right to accessible and adequate housing and reasonable standards of sanitation for every person as provided in the Constitution.[267] The Policy aims at facilitating the provision of adequate and affordable shelter and a healthy living environment to all Kenyans in order to foster sustainable human settlements to minimise informal settlements.[268]

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[258] Ibid 11.
[259] Ibid 32.
[260] Ibid.
[261] Ibid 48.
[262] The State Department of Housing is under the Ministry of Lands, Public Works, Housing and Urban Development. See the Republic of Kenya *Executive Order No. 1*: *Organisation of the Republic* of *Kenya* (2023) 32.
[263] Republic of Kenya *Sessional Paper No. 5 National Housing Policy for Kenya* (1966/67).
[264] Republic of Kenya *National Shelter Strategy to the Year 2000*.
[265] Republic of Kenya *Sessional Paper No. 3 National Housing Policy for Kenya* (2004).
[266] Republic of Kenya *Sessional Paper No. 3 National Housing Policy for Kenya* (2016).
[267] Ibid xii. Article 43 (1) b of the Constitution provides for the right to housing and sanitation.
[268] Ibid 15.

Relevant to protection from evictions, the Policy aims at reforming the housing legislative and institutional framework by enacting a comprehensive housing legislation to strengthen the role of the department of housing in regulating the development of housing.[269] The Policy recognises that the current institutional framework and arrangement for housing is fragmented, inconsistent and lacks accountability because of overlapping of roles.[270] It proposes to make the existing housing legislation a key enabler to the delivery of adequate housing and to create a framework for coordination and facilitation of the housing sector, thus increasing housing production.[271]

4.8 Conclusion

This chapter discussed the legal framework in Kenya in relation to land rights and forced evictions. It underscored the problem of forced evictions from a historical perspective: from the pre-colonial, colonial to the post-colonial periods. The chapter traced the land problem in Kenya from the onset of colonial rule when the British government declared a protectorate over East Africa and entered into agreements in order to control land over the protectorate. The chapter evaluated the normative and institutional developments after the enactment of various pieces of legislation that became instrumental in enabling the Crown to acquire land in freehold tenure or long term leases. It critiqued the land rights of indigenous people especially along the coast and discussed legislation with specific reference to land registration statutes and their contribution in aggravating the problem of forced evictions.

The chapter evaluated the Kenyan legal framework for protection against forced evictions. It began with protection of land rights by the Constitution. Within the context of the norms in the Constitution, it evaluated the right to adequate housing and the right to property as key components of protecting individuals and communities from arbitrary evictions. The right to housing and the right to property have been utilised as examples that evaluate the effectiveness of the legal framework in protection from arbitrary evictions.

The chapter discussed the role of the national policy framework in respect of forced evictions and protection of the right to housing. It discussed the legislative framework that protects against forced evictions in Kenya. The chapter established that even though LLAA introduced procedural protections for forced evictions, there is no legislation that specifically

[269] The National Housing Policy (note 266 above) xiii.
[270] Ibid 45.
[271] Ibid.

addresses the substantive and procedural requirements for evictions as stipulated in international legal instruments. The procedural aspects are limited in protecting individuals and communities from arbitrary evictions. The chapter establishes that the CLA is limited in protecting communities from evictions.

Despite the fact that forced evictions violate international human rights standards and the Constitution recognises the right to housing, the country does not have substantive legislations that particularly address the problem of forced evictions. Even though the policy documents contain scattered general statements on the intention of the State to address the problem of forced evictions and protect the right to housing, there is clearly no single policy that addresses forced evictions. The housing policy in particular falls short of recognising the right to housing as a constitutional right.

The next chapter discusses the institutional framework that has been employed in Kenya to enhance land rights and how effective they have been in addressing the problem of forced evictions. The chapter discusses the role of the national and county levels of government. It further discusses the role of the three institutions of the national government namely the executive, legislature and the judiciary. The chapter also discusses the role of national human rights institutions in protection from forced evictions.

CHAPTER 5:

KENYAN INSTITUTIONAL FRAMEWORK FOR PROTECTION AGAINST FORCED EVICTIONS

5.1 Introduction

Institutions at national and municipal or county levels have the potential to protect individuals and communities against forced evictions in Kenya. A strong and accountable institutional framework is imperative in protection against forced evictions. Institutions have a critical role of protection against forced evictions. The institutional framework includes the national and county governments. It also includes the executive, legislature and the judiciary. The institutional framework also includes quasi-government institutions and constitutional commissions. The main question to be addressed is the role of such institutions in addressing the problem of forced evictions.

The chapter examines the role of different State institutions in order to ascertain their role and effectiveness in addressing the problem of forced evictions. At the national level, the study will evaluate and discuss the role of existing State agencies that are mandated to manage land and housing. The relevant institutions under the national government include the Ministry of Lands, Public Works (MLPWHUD), Housing and Urban Development, and the National Housing Corporation (NHC). The study also discusses the role of county governments and constitutional commissions in protection against forced evictions.

The chapter is organised and arranged as follows. Section 5.1 introduces the chapter. Section 5.2 evaluates and investigates the role of institutions in protection against forced evictions. The study evaluates the role of institutions that are created by the Constitution and legislation. At the national level of governance, the section also specifically evaluates the role of the judiciary, the legislature and the executive in protection against forced evictions. The chapter evaluates the role of courts in protection against forced evictions and in particular the reliefs that courts have granted in force eviction cases.

Section 5.3 evaluates the role of county governments addressing forced evictions. Section 5.4 discusses the role of constitutional commissions and proposes institutional reforms that can make these institutions more effective in protecting people against arbitrary evictions. Section 5.5 contains the main findings and conclusion.

The following section addresses the role of institutions in protection against forced evictions. The section evaluates the constitutional foundations and essence of institutions and important elements in protection against forced evictions.

5.2 Role of Institutions in Protection against Forced Evictions

Institutions can play a critical role in protection against forced evictions. Institutions help in reducing uncertainty, facilitating everyday business and solving problems effectively.[1] They structure human interactions and provide incentives that facilitate structuring of economic, social and political activity.[2] The UN Economic Commission for Europe (UNECE) has described the components of institutions as follows:

> …institutions are made up of formal rules, informal constraints and their enforcement characteristics. Formal rules, of course, are very straightforward. They are rules put into place; they are laws, constitutions, regulations, whatever, that have the character of being specific and being defined precisely.[3]

The description by UNECE demonstrates that institutions are created with formal rules and regulations to achieve certain goals and objectives. Institutions are organised entities in society with mechanisms and processes that are aimed at meeting specific needs of people.

The institutional framework in Kenya has been indicted for not being responsive to the plight of indigenous peoples and failing to protect them from forced evictions. The African Commission on Human and Peoples Rights (the ACHPR)[4] in the *Centre for Minority Rights Development on behalf of the Endorois Community v Kenya* (*Endorois* case)[5] indicted the Kenyan government for lacking policies or governmental institutions that deal directly with indigenous peoples' issues. The ACHPR stated the fact in the following manner:

> …the ACHPR notes that the rights of indigenous pastoralist and hunter-gatherer communities are not recognised as such in Kenya's constitutional and legal framework, and no policies or governmental institutions deal directly with indigenous issues. It also notes that while Kenya has ratified most international human rights treaties and conventions, it has not ratified ILO Convention No. 169 on Indigenous and Tribal Peoples in Independent Countries, and it has

[1] United Nations Economic Commission for Europe 'The Role of Institutions in Economic Development: Occasional Paper No. 1' (2003) < unpubli@unog.ch> accessed 1 April 2022 [1].
[2] Ibid.
[3] Ibid.
[4] The ACHPR is established under Article 30 of the African Charter of on Human and Peoples' Rights with the mandate of promotion and protection of human rights in Africa. It was officially inaugurated on 2 November 1987.
[5] Communication 276/2003.

withheld its approval of the United Nations Declaration on the Rights of Indigenous Peoples of the General Assembly.[6]

The ACHPR ruled that the government had a duty to take positive steps to protect indigenous communities such as the *Endorois* by promoting cultural rights through creation of opportunities, policies and institutions.[7] The ACHPR observed that policies and institutions enhance the development and existence of different cultures and ways of life despite the challenges that face indigenous communities in Kenya.[8] Most importantly, the ACHPR observed that institutions are essential in protection of indigenous peoples who are prone to forced evictions from their land.[9]

The Constitution of Kenya (the Constitution) recognises policy and legislative measures as important components in the realisation of rights under Article 43.[10] The Constitution uses the term 'other measures' including the setting of standards that would facilitate realisation of socio-economic rights (SERs), to achieve progressive realisation of the rights under Article 43.[11] The 'other measures' contemplated by the Constitution can be construed to include institutional framework that facilitates realisation of the SERs under Article 43. The executive, judiciary and the legislature are critical institutions that can facilitate protection against forced evictions in Kenya.

The executive and the legislature bear the major responsibility in the realisation of SERs.[12] The courts also contribute to the realisation through translating SERs into enforceable legal claims.[13] Enforcement of SERs by court enhances their realisation. Enforcement is a key strategy for protecting individuals and communities where the channels of realisation of SERs within the executive and legislative arms become unavailable, inefficient, ineffective and insufficient.

The following section addresses the roles of the arms of government namely, the judiciary, the legislature and the executive in protection of forced evictions in Kenya.

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[6] Ibid Para 155; K Sing'oei & J Shepherd 'In Land We Trust': The *Endorois*' Communication and the Quest for Indigenous Peoples' Rights in Africa' (2010) 16 *Buffalo Human Rights Law Review* 16.
[7] The *Endorois case* (note 5 above) Para 256.
[8] Ibid.
[9] Ibid.
[10] Republic of Kenya *The Constitution of Kenya* (2010) Article 21 (2).
[11] Ibid.
[12] C Ngang 'Judicial Enforcement of Socio-Economic Rights in South Africa and the Separation of Powers Objection: The Obligation to take 'other measures.' (2014) 14 *Africa Human Rights Law Journal* 658.
[13] L Stewart 'Adjudicating Socio-Economic Rights Under a Transformative Constitution' 28 (3) *Penn State International Law Review* (2010) 506.

5.3 The Role of the Judiciary in Protecting against Forced Evictions

The Constitution establishes superior and subordinate courts. The superior courts consist of the Supreme Court, the Court of Appeal, the High Court and specialised courts include the Employment and Labour Court and the Environment and Land Court (ELC).[14] The two specialised courts have the status of the High Court. The subordinate courts include Magistrates courts, Court Martial, Kadhis' courts and tribunals established by legislation.[15] Courts as established by the Constitution and legislation have the duty of administering justice and adjudicating disputes impartially and have the potential to provide remedy to the problem of forced evictions.[16]

The courts and tribunals are guided by the principles that justice must be done to all, irrespective of status, justice shall not be delayed, nor alternative forms of dispute resolution and administration of justice without undue regard to procedural technicalities.[17] The principles that guide courts and tribunals make court action an avenue for protection of individuals and communities against forced evictions.

The Constitution grants the High Court jurisdiction to hear and determine applications for redress of denial, violation threats or infringement rights or fundamental freedoms contained in the Bill of Rights. The Constitution provides that:

> …the High Court has jurisdiction to hear and determine applications for redress of a denial, violation or infringement of, or threat to, a right or fundamental freedom in the Bill of Rights.[18]

The Bill of Rights in Article 43 (1) (b) the Constitution contains the right to adequate housing and to reasonable standards of sanitation. The Bill of Rights does not expressly make reference to protection from forced evictions. However, the general right to housing can be negatively enforced in protection from arbitrary evictions.[19] The right to housing forms an important component of protection against forced evictions. Purposive construction of the

[14] Article 162(1) & (2) of the Constitution.
[15] Ibid Article 169.
[16] N Sifuna 'The Role of Courts in Implementation of Environmental Law in Kenya' (2005) 1(2) *Law Society of Kenya Journal* 78.
[17] Ibid Article 159 (2).
[18] Ibid Article 23 (1).
[19] CJ Mashamba *Litigating Human Rights in African Institutions: Law, Procedure and Practice* (2017) 137; I Currie & JD Waal *The Bill of Rights Handbook* (2018) 586.

Bill of Rights is necessary because it enables courts to broadly interpret rights and takes into account other factors that affect realisation of rights other than addressing mere legal rules.[20]

The Bill of Rights under the Constitution would be of little effect if the courts are not properly equipped to enforce the rights and freedoms and to supervise compliance with the remedies granted.[21] The Constitution obligates the courts to develop the law through broad interpretation of the Bill of Rights and adopt the interpretation that most favours the enforcement of a right or fundamental freedom.[22] For the courts to effectively enforce the rights under the Bill of Rights, the interpretation should be articulated in expansive rather than restrictive language.[23]

Courts and in particular judges play critical roles as custodians of constitutional values such as freedom, human dignity and equality.[24] Courts lay down general principles for adjudication of the right to housing, protection of individuals and communities against arbitrary evictions and developing progressive jurisprudence in that respect.[25] Liebenberg, writing within the South African context but nevertheless applicable to the Kenya, has underscored the role of courts in adjudication of SERs by stating that:

> …SERs adjudication has a particular contribution to make in requiring government and powerful private actors to give serious and reasoned consideration to the claims of those who lack access to the economic and social resources. These groups usually resort to litigation because their claims have not been recognised or pursued in the formal political processes. If judges are to play this role effectively they will, in appropriate cases, be required to make decisions with significant policy and budgetary implications.[26]

Liebenberg also stated that the courts are the avenues in which ordinary people challenge excesses of public power by State organs or private powers by non-state entities that undermine the rights provided in the Bill of Rights.[27]

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[20] SM Mbenenge Transformative Constitutionalism: A Judicial Perspective from the Eastern Cape Public Lecture delivered at the Nelson R. Mandela School of Law, University of Fort Hare on 17 April 2018 3-4.

[21] L Juma 'Nothing but a Mass of Debris: Urban Evictions and the Right of Access to Adequate Housing in Kenya' (2012) 12 (2) *African Human Rights Law Journal* 501-502.

[22] Article 20 (3) of the Constitution.

[23] Mbenenge (note 20 above) 3.

[24] Ibid 2.

[25] CJT Mbianda 'The Public Protector as a Mechanism of Political Accountability: The Extent of its Contribution to the Realisation of the Right to Access Adequate Housing in South Africa' (2017) 20 *Potchefstroom Electronic Law Journal* 1.

[26] S Liebenberg *Socio-Economic Rights Adjudication under a Transformative Constitution* (2010) 70.

[27] Ibid.

Courts have a role in ensuring that procedural requirements in protection against forced evictions are adhered to. Firstly, the court as part of remedial measures should ensure reasonable alternative accommodation is provided or is available before granting an eviction order.[28] Secondly, courts should ensure that meaningful engagement and constructive discussion in the form of mediation has been explored before evictions are carried out.[29] Liebenberg observes that meaningful engagement and mediated solutions are instrumental in assessing the justice and equity of the eviction of people from their homes.[30] This is part of procedural protection from forced evictions as observed by the CESCR in General Comment No. 7.[31]

Courts are instrumental in ensuring where eviction is considered to be inevitable, the actors adhere to the relevant provisions of international human rights law and the general principles of reasonableness and proportionality. Courts prompt the legislature and the executive to give effect to SERs through comprehensive, participatory social programmes and legislation.[32] The role of courts is to consistently prompt them to give effect to SERs in the event they fail to fulfil their constitutional responsibilities.

Regarding land rights and forced evictions in Kenya, the Constitution has established the ELC.[33] The ELC is a superior court for the purpose of hearing and determining disputes relating to land and the environment.[34] The enabling legislation is the Environment and Land Court Act, 2011.[35] The ELC has original and appellate jurisdiction in matters relating to the use, occupation and title to land. The power of the court to adjudicate on use and occupation of land is relevant to the protection against forced evictions. The ELC has the potential to

[28] *Government of the Republic of South Africa and Others v Grootboom and Others* (2001) (1) SA 46 (CC) Paras 29 & 45.

[29] Ibid. South African courts have made progressive developments on the aspects of mediation, meaningful engagement and provision of alternative accommodation. Chapter 6 of this thesis will address norms and jurisprudence from South Africa to elicit best practices that Kenya can incorporate.

[30] Liebenberg (note 26 above) 154.

[31] UN CESCR General Comment No. 7: The Right to Adequate Housing (Art.11.1): Forced Evictions 20 May 1997 UN Doc E/1998/22.

[32] Liebenberg (note 26 above) 71.

[33] Article 162 (1) b of the Constitution. The Constitution provides that 'parliament shall establish courts with the status of the High Court to hear and determine disputes relating to the environment and the use and occupation of, and title to, land.'

[34] Ibid; TO Ojenda *Land Law and Conveyancing: Principles and Practice* (2015) 87-88.

[35] Cap 12A Laws of Kenya.

interpret the provisions and implications of the treaties and conventions that have been ratified by Kenya.[36]

The ELC has been instrumental in interpreting international law norms on forced evictions and granting remedies to the occupiers. The Constitution does not have express provisions for protection from forced evictions. However, the ELC has attempted to negatively enforce the right to housing under the Constitution to proffer protection against arbitrary evictions. Kenya has an inadequate legislative framework that seeks to address the problem of forced evictions.[37] In absence of express provisions for protection against forced evictions in the Constitution and weak legislative framework, the ELC has in few instances considered the best international practices in deciding on cases of forced evictions in Kenya.

The following section addresses the remedial measures by the courts and their effectiveness in protecting against forced evictions.

5.4 Remedies available in Unlawful Eviction Cases

The Constitution grants power to courts to grant effective remedies in litigation under the Bill of Rights by according every person the right to institute proceedings claiming that a right or fundamental freedom in the Bill of Rights has been denied, violated or infringed, or is threatened.[38] The Constitution also grants power to the High Court to determine the questions on whether laws and actions are inconsistent with or in contravention of the Constitution.[39] The courts have granted reliefs in the form of declaratory orders and have in several instances used structural interdicts in forced eviction cases. The two remedies are discussed below.

5.4.1 Declaratory Orders

The courts have granted reliefs in the form of declarations that a right has been violated or that a law is inconsistent with the Constitution, ordering judicial review and in some instances, making orders for compensation.[40] The relief of declaration allows the courts to clarify and declare rights on the one hand while leaving the decision on how best to realise

[36] Kenya National Commission on Human Rights '*Making the Bill of Rights Operational: Policy Legal and Administrative Priorities and Considerations*' (2011) <www.knchr.org> last accessed on 1 November 2021.
[37] See the analysis of Kenya's legislative framework on forced evictions in Section 4.6 of Chapter 4.
[38] Article 22 (1) of the Constitution.
[39] Ibid Article 165 (3) (d).
[40] Ibid Article 23 (3) b.

the rights on other branches of the State.[41] The legal basis for the relief is that the court has good grounds for believing that the State understands its obligations and will fulfil the obligations as described in the order.[42]

The *Fatuma Khamis Bilal & 3505 others v Kenya Railways Corporation & 6 others*[43] case concerned eviction notices made by the Kenya Railways Corporation (KRC) to the *Nubian* community living in Kisumu county. The community claimed to have been in possession and occupation of the land since 1937 without any interruptions or eviction threats.[44] The Ministry of Lands, Housing, Public Works and Urban Development had prepared the settlement scheme advisory plan in 2012 and the KRC neither complained nor indicated any interest in the land inhabited by the community.[45]

The KRC issued a seven day notice to the petitioners and thereafter destroyed their homes and other structures thereby evicting them from the land, giving rise to the suit.[46] The KRC argued that the petitioners had not demonstrated that all the procedures in survey, alienation, transfer and registration were duly followed to enable a procedural transition of proprietorship of the suit land from them.[47] The Court found that the disputed land was Crown land that was alienated by the governor in 1937 to the Nubian Community by virtue of Legal Notice no 440 of 1963 issued under the Kenya (Vesting of Land) Regulations of 1963.[48] The Court further found the land occupied by the petitioners was not part of the land vested in the KRC since it had been alienated in 1937 and therefore the eviction, destruction and demolitions of property was an affront to the petitioner's right to property.[49]

The finding by the ELC vindicated the right to property of the community by not only protecting them from forced evictions but also protecting their right to housing by stating that:

> …any forcible, violent and brutal eviction through demolition of homes of the petitioners and other residents of the Kibos informal settlement, without according them alternative shelter and or

[41] Currie & De Waal (note 19 above) 196.
[42] Liebenberg (note 26 above) 382
[43] 2021 eKLR.
[44] Ibid
[45] Ibid 12.
[46] Ibid.
[47] Ibid 13.
[48] Ibid.
[49] Ibid.

> accommodation and leaving them to live in the open exposed to the elements and vagaries of nature is a violation of their fundamental rights to accessible and adequate housing.[50]

The ELC declared that destruction of property without a court order and without, according to the affected parties, an opportunity to salvage any of their belongings is a violation of the fundamental right to protection of property guaranteed by the Constitution.[51] The ELC further vindicated the right to property under Article 40 of the Constitution. The right to housing and property have previously been utilised in this study as examples to evaluate the effectiveness of the norms in protection against forced evictions.[52] The ELC also declared that forced evictions without warning, court orders and reasonable notice in writing was a violation of the petitioner's fundamental right to fair administrative action guaranteed by the Constitution.[53]

The ELC ruled in favour of the petitioners by stating that they were entitled to full compensation for the loss suffered during and after the illegal demolition of their structures.[54] However, the ELC provided guidance to the petitioners by urging them to file a separate civil suit for compensation as the damages incurred could not be ascertained in the petition.[55] In this case the ELC played an important role in restraining the State and non-state actors from participating in arbitrary evictions and declaring the unconstitutionality of such actions. The case demonstrates that courts have remedial powers that attempt to offer solutions to forced evictions. However, there is inadequate guarantee of enforcement of court orders directed to the executive branch of government, especially because of budgetary resource constraints.[56]

The High Court in the *Ibrahim Sangor Osman v The Minister of State for Provincial Administration and Internal Security* case provided a remedy in the form of a declaration. The High Court declared that the forcible, violent and brutal eviction through demolition of homes of the petitioners was in violation of their fundamental rights guaranteed in the Constitution.[57] The High Court further gave a mandatory injunction to the Minister of State for Provincial Administration and State Security to cease any further evictions and facilitate

[50] Ibid 14.
[51] Ibid 4, 9 & 14. The relevant provisions in the Constitution as referenced by the ELC are Articles 40 (1), (3) and (4) as read with 21 (3).
[52] See Section 4.3 of Chapter 4.
[53] The *Fatuma Khamis Bilal* case (note 43 above) 14. The right to fair administrative action is provided under Article 47 of the Constitution.
[54] Ibid 15.
[55] Ibid.
[56] L Franceschi & PLO Lumumba *The Constitution of Kenya: A Commentary* (2019) 202-203.
[57] Constitutional Petition No. 2 of 2011 (eKLR) 7.

the return of the petitioners to the land from which they were evicted.[58] The High Court underscored that in essence, injunctions restrain future arbitrary evictions and demolitions without legal substantive and procedural protection of the occupiers.[59]

The remedy in the form of declaratory orders allows the executive to exercise its discretion on a range of complex policy choices for giving effect to protection from arbitrary evictions. The remedy further allows governments to adopt the necessary policies and legislation. However, the remedy is only appropriate if the State understands its obligations and is willing to take the necessary steps to fulfil the obligations described in the order. The remedy further leaves the implementation solely in the hands of the State. The following section discusses the remedy of structural interdict which allows the courts to supervise orders.

5.4.2 Structural Interdicts

Courts in Kenya have applied structural interdicts as remedies in forced eviction cases with minimal impact. Structural interdicts are remedies that involve the continuous involvement of the courts in implementation of their orders. They entail orders that require the parties in a case to negotiate a plan which will give effect to the relevant right and report back to the court on a regular basis.[60] The court issues a set of directions that regulate further engagement with the parties and implementation of the plans until the court is satisfied that the infringement of rights is satisfactorily remedied.[61] Structural interdicts enable courts to monitor compliance of court orders and facilitate engagement between the parties concerning the specific measures required to give effect to the normative standards set in the court orders.[62]

Structural interdicts help eliminate systemic violations of human rights that exist within organisational and institutional settings.[63] They do not seek to offer compensation to past wrongs but rather to adjust future behaviour through the court's active participation in the implementation of its orders.[64] They respond to the systemic violations of a complex organisational nature by addressing gaps left by the traditional remedies which are inadequate

[58] Ibid.
[59] Ibid.
[60] Liebenberg (note 26 above) 424.
[61] Ibid.
[62] Ibid.
[63] C Mbazira 'From Ambivalence to Certainty: Norms and Principles for the Structural Interdict in Socio-Economic Rights Litigation in South Africa' (2008) 24 *South African Journal of Human Rights* 4.
[64] Ibid 5.

in eliminating systemic violations of human rights.[65] System violations establish themselves and endure in a sustained manner as part of an institutional behaviour and require a systemic approach to tackle.[66] The systemic approach embodies effective and participatory remedies. Van Der Berg has supported this fact by stating that:

> …the structural interdict potentially embodies an effective and participatory remedy that can overcome traditional concerns that courts lack the constitutional and institutional competence required to adjudicate complex resource allocation decisions. By accommodating these concerns at the remedial stage of adjudication, the need for deference in applying a capabilities-based standard of review to allocative decisions is obviated.[67]

Currie and De Waal observe that structural interdict is arguably the most effective remedy in forced eviction matters.[68] They have provided five elements that are contained in structural interdicts. The first element is the declaration by the court that conduct by the government falls short of its constitutional obligation and the second element is the order to the government to comply with the obligation.[69] The third element is the order by the court to the government to produce a report within a specified time setting out the steps it has taken and anticipates to take under the prevailing circumstances. The fourth element is the opportunity by the applicant to respond to the report and the fifth element is the hearing and upon satisfaction by the court, the report is made an order of the court.[70]

5.4.2.1 Application of Structural Interdicts by the Courts

5.4.2.1.1 *Satrose Ayuma & 11 others v Registered Trustees of the Kenya Railways Staff Retirement Benefits Scheme & 3 others* case

The High Court in the *Satrose Ayuma case,*[71] determined the rights of the petitioners to adequate housing and sanitation as well as the right to human dignity and protection against forced evictions. The High Court stated that the right to adequate housing of the petitioners would have been violated by the manner in which the evictions were to be carried out.[72] The High Court observed that if the evictions were to be carried out without a proper plan and adequate notices, then the petitioners would be rendered homeless and vulnerable

[65] Ibid.
[66] C Mbazira *Litigating Socio-Economic Rights in South Africa: A Choice between Corrective and Distributive Justice* (2009) 110-111.
[67] S Van Der Berg 'A Capabilities Approach to Remedies for Systemic Resource-Related Socio-Economic Rights Violations in South Africa' (2019) 19 *African Human Rights Law Journal* 300.
[68] Currie & De Waal (note 19 above) 199.
[69] Ibid.
[70] Ibid.
[71] High Court of Kenya at Nairobi Petition No. 65 of 2010 and (2013) eKLR.
[72] Ibid Para 89.

The High Court in granting a structural interdict, ordered the Attorney General to file an affidavit within 90 days after the judgement detailing out the existing or planned State policies and legal framework on forced evictions and demolitions and if the policies or legal framework adhere to acceptable international standards.[73] The High Court also ordered the Attorney General to provide information regarding measures that the government had put in place towards the realisation of the right to accessible and adequate housing and to reasonable sanitation in accordance with the Constitution.[74]

The High Court granted an injunction stopping the trustees from evicting the petitioners until the case was finally determined. Additionally, the Court offered guidance that neutral observers should be present during evictions including a mandatory presence of governmental officials or county officials, adherence to the rights to human dignity, life and security of the evictees.[75] The High Court also guided that evictions should not be carried out at night, during bad weather seasons and during times that could affect learning in schools.[76]

5.4.4.2 *Mitu-Bell Welfare Society v Attorney General & 2 Others* Case

The *Mitu-Bell Welfare Society* case[77] was first heard and determined by the ELC. The ELC declared that demolitions and forceful evictions were illegal, irregular and violated the rights of the occupiers.[78] The ELC held that the respondents who included the Commissioner of Lands, the Kenya Airports Authority (KAA) and the Attorney General had violated the right to housing and other SERs provided in Articles 43 and 21 of the Constitution.[79] The ELC ruled that demolition of the homes of poor people without providing an alternative accommodation violated the right to housing of the applicants provided in Article 43 on the positive obligation to ensure access to SERs.

The ELC did not grant the relief of compensation to Mitu-Bell Welfare Society (the Society) but requested for more information from the respondents before giving further orders on the relief of compensation to the occupiers. The ELC, in issuing a structural interdict ordered the respondents to provide information on the current State policies and programmes on

[73] Ibid Para 111(b).
[74] Ibid Para 111(c).
[75] Ibid Para 111 (e).
[76] Ibid.
[77] *Mitu-Bell Welfare Society v Attorney General & 2 others* (2013) eKLR.
[78] Ibid Para 75.
[79] Ibid Para 77. Article 43 of the Constitution of Kenya provides for protection of economic and social rights and Article 21 provides for the implementation of rights and fundamental freedoms.

provision of shelter and access to housing for the marginalised groups such as residents of informal and slum settlements.[80] The ELC further directed the respondents to engage with the petitioners, other relevant state agencies and civil society organisations with a view to identifying an appropriate resolution to the grievances of the occupiers following their eviction.[81] The declaration and orders by the court can be termed as progressive in protection against forced evictions.

The case was later determined by the Court of Appeal (the Court).[82] The Court stated that even though the Kenyan legal framework is inadequate in addressing the right to housing in Kenya, the courts do not have any role in granting prescriptive rights to land in the name of enforcement of SERs.[83] The Court found that the High Court erred in law in issuing orders and directions compelling KAA and other government agencies to formulate policy and programs for provision of shelter and access to housing for residents of informal and slum settlements.[84] In doing so, the Court opposed the application of structural interdicts in forced eviction cases. The Court observed that the High Court erred in using structural interdicts by stating that:

> … by allowing parties to file affidavits and reports after judgement, the trial Court erred in law as the procedure has the potential to introduce secondary litigation and raise new issues that were not in the original pleadings. That such a procedure was not provided for in the Civil Procedure Act and Rules and perpetuated and introduced secondary and side litigation; and that it was impermissible to allow parties to file pleadings after judgement.[85]

The Court found that the High Court erred in law in issuing orders and directions on un-pleaded issues and faulted the judge's directions that required third parties to comment on the policies and guidelines which the Court found was not a prayer in the petition.[86] The Court faulted directions to the effect that the parties engage civil society organisations as *amici curiae* for purposes of identifying appropriate remedies.[87] In faulting the directions, the Court contradicted itself by observing that the Constitution provides that courts may invite persons with expertise on a particular issue to participate as *amicus curiae* in matters involving general public interest.

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[80] Ibid Para 79 (i).
[81] Ibid Para 79 (iii).
[82] *Kenya Airports Authority v Mitu-Bell Welfare Society & 2 others* (2016) eKLR.
[83] Ibid Para 136.
[84] Ibid Para 141 (h).
[85] Ibid Para 73.
[86] Ibid Paras 94-96.
[87] Ibid Para 94.

The Court argued that the orders of the High Court were contrary to the statutory mandate of the KAA, the appellant in the case.[88] The Court also argued that the High Court had erred in finding that KAA should have provided Mitu-bell Welfare Society with alternative accommodation or a relocation plan.[89] The Court observed that KAA and other government agencies in the case were not vested with the constitutional mandate to identify and determine appropriate relief and resolution to the grievance raised by the Society.[90]

The Court set aside in entirety the judgement given by the High Court without providing a solution to the unlawfully evicted occupants who were left without a remedy. The Court ruled that concept of structural interdicts were not part of the Kenyan legal system and ruled that the High Court erred in delivering a judgement that was not a final judgement determining the rights and liability of parties. The Court fundamentally misconstrued the role of structural interdicts which aim at supervising the implementation of orders granted by the courts.[91]

By setting aside the judgement by the High Court, the Court was retrogressive and its decision affront to protection against forced evictions in informal settlements in Kenya. Khakula argues that the Court should have focused on ensuring that the petitioners get justice for violation of their rights and not shoot down the structural interdicts as an appropriate remedy by the High Court.[92] Khakula observes that the finding by the Court denied the applicability of structural interdicts in Kenyan law but contradicted itself by suggesting that courts can use structural interdicts as long as they are precise and specific to avoid vagueness which can easily result in breach of the doctrine of separation of powers where the judiciary finds itself making policy instead of interpreting the law.[93]

The Society appealed to the Supreme Court (SC). The SC ruled that protection from forced evictions is not necessarily in the form of an order restraining the State agency from evicting the occupants but courts can be innovative in crafting adequate reliefs such as compensation, the requirement of adequate notice before eviction, the observance of humane conditions

[88] Ibid Paras 90-92.
[89] Ibid Para 119.
[90] Ibid Para 141 (b).
[91] V Miyandazi 'Setting the Record Straight in Socio-Economic Rights Adjudication: The Mitu-Bell Welfare Society Supreme Court of Kenya Judgment' (2022) 6 *Kabarak Journal of Law and Ethics* 38.
[92] A Khakula 'Embracing Structural Interdicts in the Enforcement of Socio-Economic Rights in Kenya: Analysis of the Court of Appeal Decision in the *Mitubell* Case' (2018) 2 *Jomo Kenyatta University of Agriculture and Technology Law Journal* 181.
[93] Ibid 179.

during eviction and the provision of alternative land for settlement.[94] The SC upheld the use of structural interdicts by virtue of Article 23(3) of the Constitution as an appropriate relief that a court may grant in forced eviction cases.[95] The SC disagreed with the decision by the Court of Appeal by stating that where a court of law issues an order whose objective is to enforce a right, or to redress the violation of such a right, it cannot be said to have abdicated its judicial function as long as the said orders are carefully and judicially crafted.[96]

The SC observed that courts can be innovative in granting structural interdicts. Though the SC upheld the use of structural interdicts as had been applied by the High Court, it observed that the most effective relief open to the occupiers under the prevailing circumstances was a claim for compensation since they had already been evicted from the land.[97] The SC observed that the orders by the High Court requiring the respondents to furnish the court with the current state policies and programmes on provision of shelter and access to housing did not have any remedial benefits to the occupiers. Courts can issue orders other than those listed as they deems fit on a case-by-case basis.[98]

The SC observed that orders aimed at enforcing rights or providing redress to the violation of such a right should be carefully and judicially crafted.[99] Interim reliefs, structural interdicts, supervisory orders or any other orders that may be issued by the courts, have to be specific, appropriate, clear, effective, and directed at the parties to the suit or any other State agency vested with a constitutional or statutory mandate to enforce the order.[100] The SC ruled that such structural interdicts must be realistic to avoid the temptation of judicial overreach, especially in matters of policy. Additionally, the orders should be addressed to parties who bear the constitutional or statutory mandate to enforce them and where necessary, a court of law may indicate that the orders are of an interim nature and that the final judgement shall await the crystallisation of certain actions.[101]

The SC further recognised the remedies contained in international legal instruments such as the UN Guidelines, General Comments and foreign case law which can be applied by the

[94] *Mitu-Bell Welfare Society v Kenya Airports Authority & 2 others; Initiative for Strategic Litigation in Africa (Amicus Curiae)* (2021) eKLR.
[95] Ibid Para 121.
[96] Ibid.
[97] Ibid Paras 154 & 155.
[98] Ibid Para 121.
[99] Ibid.
[100] Ibid.
[101] Ibid Para 122.

courts as long as it is consistent with the Constitution to vindicate the right to housing for those living in informal settlements. The SC observed that the most effective relief open to the occupiers was a claim for compensation since they had already been evicted from the land.[102] The SC observed that the orders by the High Court requiring the respondents to furnish the court with the current State policies and programmes on provision of shelter and access to housing did not have any remedial benefits to the occupiers.

The SC distinguished between the eviction from public and private land in light of its judgement. The SC stated that an illegal occupation of private land, cannot create prescriptive rights over that land in favour of the occupants.[103] Regarding illegal occupation of public land, the SC held that a long period of occupation by a group of people crystallises their protectable right to housing.[104] The SC held that the land tenure system in the country has radically been transformed by the Constitution by stating that:

> …the 2010 Constitution has radically transformed land tenure in this country by declaring that all land in Kenya belongs to the people of Kenya collectively as a nation, communities and individuals. It also now creates a specific category of land known as public land. Therefore, every individual as part of the collectivity of the Kenyan nation has an interest, however indescribable, however unrecognisable, or however transient, in public land.[105]

Miyandazi posits that the holding by the SC is ground-breaking because it was unclear and difficult to claim prescriptive rights over public land by virtue of a long period of occupation under the current land laws.[106] Additionally, Miyandazi explains that long-term occupation that could lead to rights over a parcel of land has only been clear in the context of adverse possession of private land.[107]

The decision by the SC in the *Mitu-Bell Welfare* case demonstrates that structural interdicts are appropriate remedies in forced eviction cases. However, the success of structural interdicts depends on the willingness of the executive to respect court orders. If the executive fails to comply with court orders, the aggrieved parties may not realise the reliefs through

[102] Ibid Paras 154 & 155.
[103] Ibid Para 151.
[104] Ibid.
[105] Ibid.
[106] Miyandazi (note 91 above) 52-53.
[107] Ibid 53. Adverse possession entails a process where the exclusive possession of another's private land is extinguished by lapse of time as defined in Section 7 of the Limitation of Actions Act. The Section states that 'An action may not be brought by any person to recover land after the end of twelve years from the date on which the right of action accrued to him or, if it first accrued to some person through whom he claims, to that person.' See also Ojienda (note 34 above) 174.

structural interdicts. This thesis will subsequently consider meaningful engagement as a form of structural interdict which can be more effective in forced eviction cases.[108]

The following section evaluates the role of the legislature in protection against forced evictions.

5.5 The Role of the Legislature in Protecting against Forced Evictions

The Constitution establishes the legislature comprising the national assembly which represents the people of the constituencies and special interests, and the senate which presents the counties by serving to protect the interests of the counties and county governments.[109] The legislature through the national assembly and the senate perform a constitutional duty of protecting, promoting and fulfilling fundamental rights and freedoms.

The legislature is supposed to ensure the widest possible enjoyment of rights and fundamental freedoms while allocating resources.[110] In doing so, the legislature should have regard for prevailing circumstances which include the vulnerability of individuals or groups.[111] The actions by the legislature enhance enjoyment of fundamental rights and freedoms. Conversely, omission by the legislature to exonerate the mandate is a violation of the fundamental rights and freedoms.

The role of the legislature in respect of forced evictions is to enact enabling legislation by responding to what the courts have pronounced in respect of protecting individuals and communities from forced evictions. In particular, the High Court in the *Satrose Ayuma* case[112] urged the legislature to enact legislation that offers protection from forced evictions by stating that:

> …to that end, I strongly urge parliament to consider enacting a legislation that would permit the extent to which evictions may be carried out. The legislation would also entail a comprehensive approach that would address the issue of forced evictions, security of tenure, legalisation of informal settlements and slum upgrading.[113]

The High Court in this case underscored the need for a legislative framework to protect against evictions and to guide evictions in the event they are inevitable. The High Court

[108] Section 6.5.1 of Chapter 6.
[109] Articles 95 & 96 of the Constitution.
[110] Ibid Article 20 (5) (b).
[111] Ibid.
[112] The *Satrose Ayuma* case (note 71 above).
[113] Ibid Para 109.

observed that Kenya lacked appropriate legislation to provide guidelines on forced evictions.[114] The High Court in urging the legislature to enact appropriate legislation on forced eviction breathed life into Article 43 (1) b of the Constitution by formulating remedies that facilitate the executive and the legislature to take the necessary steps and measures that ensure adequate and effective legal framework.

The High Court in the case of *Susan Waithera Kariuki & 4 Others v Town Clerk Nairobi City Council & 2 Others*[115] made the same observation by stating that Kenya should develop appropriate legal guidelines on forced eviction and displacement of people from informal settlements.[116] The High Court further stated that legal guidelines would be imperative in mitigating extreme suffering and indignity to the people in the event that forced eviction is inevitable.[117] The High Court noted that the requirements set out by the CESCR in General Comment No. 7[118] had not been put in practice in Kenya.[119] The *Satrose Ayuma* and *Susan Waithera* cases provided appropriate guidance to the legislature to enact an appropriate and effective legal framework to regulate evictions.

The legislature is supposed to ensure that all the Bills brought before it comply with human rights obligations before being enacted into law.[120] The legislature should ensure compliance with human rights obligations contained in treaties ratified by the State and scrutinise new treaties with human rights implications prior to their ratification.[121] By ensuring that legislation complies with international human rights standards, the legislature should refrain from passing legislation that unjustifiably interfere with human rights or legislation that may fail to deter actions by State or non-state actors who are likely to violate human rights.[122]

Kenya has ratified international law instruments that protect against forced evictions and is bound to implement the commitments under international law including general rules of

[114] Ibid Para 108.
[115] (2011) eKLR.
[116] Ibid 9.
[117] Ibid 9-11.
[118] UN CESCR General Comment No. 7: The Right to Adequate Housing (Art.11.1): Forced Evictions (1997) UN Doc E/1998/22.
[119] The *Susan Waithera* case (note 115 above) 9.
[120] M Hunt, H Hooper & P Yowell *Parliaments and Human Rights: Redressing the Democratic Deficit* (2012) <http://ahrc.ukri.org> accessed 30 November 2021 [13].
[121] Ibid 13-14.
[122] Ibid.

international law, international agreements, conventions and treaties.[123] The legislature has a role in ensuring compliance with the obligations in the international law instruments that Kenya has ratified. That entails enactment of legislation that protects against forced evictions in compliance with international human rights standards.

The legislature should also reform the housing legislation that incorporates security of tenure, availability, affordability, accessibility, habitability and cultural adequacy[124] as a measure to curb forced evictions. Though the legislature has the role in ensuring compliance with international law obligations, it has not passed a legislation that provides substantive and procedural protection to individuals and communities against forced evictions.

The following section evaluates the role of institutions governed by the executive arm of government in protection against forced evictions.

5.6 The Role of Institutions under the Executive Arm in Protection against Forced Evictions

5.6.1 Ministry of Lands, Public Works, Housing and Urban Development (MLPWHUD)

MLPWHUD is currently constituted pursuant to an Executive Order No. 1 of 2023.[125] The functions of MLPWHUD relevant to this study include land policy management, physical planning, land transactions, survey and mapping, land adjudication, settlement matters, rural settlement planning, land reclamation, national spatial data infrastructure, land registration, land and property valuation services, and administration of public land as designated by the Constitution.[126] MLPWHUD is the key policy making body on matters relating to land.

MLPWHUD through the State department of lands and physical planning developed the Eviction and Settlement Guidelines in 2009[127] and was instrumental in formulating the Evictions and Resettlement Procedures Bill (ERPB) in 2012.[128] However, the substantive law on eviction has not been enacted by the legislature to date. The ERPB had envisaged the

[123] M Mbondenyi & J Ambani *The New Constitutional Law of Kenya: Principles, Government and Human Rights* (2012) 24-26.
[124] UN CESCR General Comment No. 4 'The Right to Adequate Housing' (1991) UN Doc No. E/1992/23 [Para 8].
[125] Republic of Kenya *Executive Order No. 1: Organisation of the Government of the Republic of Kenya* (2023) 23.
[126] Ibid.
[127] Republic of Kenya *Eviction and Settlement Guidelines: Towards Fair and Justifiable Management of Evictions and Resettlements* (2009). For analysis of the policy documents, see Section 4.4.2 of Chapter 4.
[128] Republic of Kenya *The Evictions and Resettlement Procedures Bill* (2012).

procedures that were to guide the court proceedings during and after evictions. These elaborate procedures were not included in the 2016 amendments to the Land Act on protection against forced evictions.[129] The guidelines can provide a framework on evictions that align with internationally accepted standards, which would enhance protection from forced evictions.

5.6.2 The National Housing Corporation

The State Department of Housing under MLPWHUD oversees the National Housing Corporation (NHC).[130] The main role of the NHC is to give loans for the purposes of purchasing or constructing approved dwellings or to carry out approved housing schemes.[131] The NHC is established as a body corporate with perpetual succession and a common seal, and performs the duties and have the powers conferred on it by the Housing Act.[132]

The NHC consists of public officials including the principal secretary in charge of the State Department of Housing and not more than eight members appointed by the minister in charge of housing who should have knowledge of housing development or housing finance.[133] The NHC is also empowered to undertake research in housing related matters, dissemination of information concerning housing and related matters and to operate a housing finance institution with powers to borrow funds from the government, overseas agencies, pension and trust funds and any other institution or persons to finance residential housing development.[134]

The Housing Act establishes the housing fund under the control of the NHC.[135] The NHC considers the financial position of any company, building society or individual person and the ability of repayment before granting loans to build houses.[136] The loans attract interest that is determined by the NHC from time to time. The housing fund has not been designed to address the housing problem in Kenya. The fund is modelled to assist the people who have the capacity to take loans and repay them within prescribed timelines with the interests determined by the NHC. The NHC addresses the housing needs of the working segment of the Kenyan population.

[129] Land Laws (Amendment) Act 28 of 2016.
[130] The NHC is established under Section 3 of the Housing Act Cap 117 Laws of Kenya.
[131] Ibid Section 7A.
[132] Ibid Section 3.
[133] Ibid Section 4.
[134] Ibid Section 7B.
[135] Ibid Section 6.
[136] Ibid Section 7 (3).

The architecture and design of the NHC were not modelled to address the housing problem of the vulnerable and marginalised segments of Kenyan society. The NHC and the housing fund do not align to the constitutional guarantee of the right to housing. This contributes to vulnerability to arbitrary evictions. Odongo observes that the mortgage market and housing finance in Kenya has targeted the high and upper middle income citizens and leaves out the rest of the populace.[137] He also observes that there is inequality and disparity in the housing sector in Kenya with the high and upper middle income Kenyans living in well serviced and planned houses and the low income Kenyans living in informal settlements.[138]

NHC has not been significant in protection against forced evictions. However, its role could be enhanced to play a greater part in provision of housing in conjunction with the devolved county governments. The role of the NHC, if enhanced, would play a critical role in addressing the problem of evictions and provision of emergency and alternative housing. The NHC should be strengthened through legislation to collaborate with county governments to address the problem of evictions and provision for emergency and alternative housing.

5.6.3 The National Land Commission

The National Land Commission (the NLC) is established under Article 67(2) of the Constitution with the mandate of managing public land on behalf of the national and county governments, recommending a national land policy to the national government and advising the national government on a comprehensive registration of land titles program in the country.[139] The NLC is further mandated to carry out research and recommendations to relevant authorities on land and the use of natural resources, and to investigate and recommend remedies to present or historical land injustices and encourage the use of traditional dispute resolution mechanisms in land conflict resolution.[140]

The NLC performs functions prescribed by its enabling legislation, the National Land Commission Act (NLCA).[141] NLCA provides for the objects and principles of devolved governments in the management and administration of land. NLCA mandates the NLC to alienate public land on behalf and with the consent of both levels of government, monitor the

[137] OM Benard 'The Right to Housing in Kenya: From Law to Practice' (2015) 2 (11) *Law Society of Kenya Journal* 38-39.
[138] Ibid 39.
[139] Ibid Article 67 (2) (c).
[140] Ibid.
[141] Act 5 of 2012.

registration of all rights and interests in land and ensure sustainable management of public land, including land held by State agencies.[142] NLCA further mandates the NLC to manage and administer all unregistered community land on behalf of the county governments and develop mechanisms for the use of alternative dispute resolution in resolving land disputes.[143]

The Land Laws (Amendment) Act (LLAA)[144] grants the NLC mandate to deal with forced evictions of illegal occupation of public land as follows:

> …the NLC shall cause a decision relating to an eviction from public land to be notified to all affected persons, in writing, by notice in the Gazette and in one newspaper with nationwide circulation and by radio announcement, in a local language, where appropriate at least three months before the eviction.[145]

The mandate provided to the NLC by LLAA does not have sufficient substantive and procedural protection to occupiers of public land. The LLAA does not consider the essence of the court process before evictions. The LLAA does not create an avenue of mediation with occupiers in the event of being rendered homeless.

Angote observes that evictions from public land are common and are motivated by public good or political influences.[146] However, the SC has created protectable rights to housing occupation of public land.[147] The SC justified creation of the protectable right to housing to deter State and non-state agents from carrying out arbitrary evictions without seeking remedies for the occupiers of land. The SC stated that the Constitution has radically transformed land tenure in Kenya by declaring that all land in Kenya belongs to the people of Kenya collectively as a nation, communities and individuals.[148] The SC ruled that since the Constitution has created the category of public land, any Kenyan has an interest whether indescribable, unrecognisable or transient on public land.[149] This decision by the SC makes an important development in the attempt to offer protection to occupiers of informal settlements. The decision is critical in informing enactment of legislation that offers adequate and effective protection to occupiers from forced evictions.

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[142] Ibid Section 5 (2) (c).
[143] Ibid Section 5(2) (f).
[144] LLAA (note 129 above).
[145] Ibid Section 152C.
[146] OA Angote 'Evictions in Kenya: Which Way under the New Constitution and the Land Laws (Amendment) Act 2016?' (2018) 2(2) *Journal of Conflict Management and Sustainable Development* 77.
[147] The SC *Mitu-Bell Welfare* case (note 94 above) Para 151. See also Miyandazi (note 91 above) 52-53.
[148] Ibid.
[149] Ibid.

The following section addresses the role of devolved county governments in protection against forced evictions.

5.7 The Role of County Governments in Protection against Forced Evictions

Kenyan county governments are devolved governments created by the Constitution. The Kenyan territory is divided into 47 counties.[150] Devolution involves the transfer of power of governance to lower level units that assume responsibility for their own governance.[151] Muia posits that devolution is an approach that is increasingly seen as a model of making government accountable to the people.[152] Additionally, Muia defines devolution as the transfer of executive and legislative power and creation of two distinct and interdependent levels of government, the national and county governments.[153] The two levels of government are supposed to operate in an environment of mutual relations in a consultative and cooperative manner. The effect of devolution has been demonstrated as follows:

> …devolution under the new constitution will, in all probability, result in a major shift in the power configuration: as the various counties have urgent developmental priorities, and with their elected leadership committed to local issues, they are unlikely to render themselves amenable to undue control by the central government. The county set-ups are destined to generate contentious matters for judicial determination, in view of the competing interests therein, and also in relation to possible conflicts with national authorities.[154]

Devolution creates lower level units of government which elect their leaders, raise revenue and make decisions independently. The devolved units have legally defined geographical boundaries within which they exercise authority and perform public functions. The devolved units are not under obligation to seek authority from the central government before making and implementing decisions that fall within their jurisdiction.[155]

The Constitution outlines the objects of devolution and provides that devolution related disputes may be resolved through advisory opinions to county governments by the Supreme

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[150] Article 63(4) of the Constitution.

[151] D Muia 'Devolution of Governance to Districts in Kenya' in T Kibua & G Mwabu (eds) *Decentralization and Devolution in Kenya: New Approaches* (2008) 77; Mbondenyi & Ambani (note 123 above) 100.

[152] Ibid.

[153] Ibid.

[154] JB Ojwang *Ascendant Judiciary in East Africa: Reconfiguring the Balance of Power in a Democratizing Constitutional Order* (2013) 54.

[155] M Odero 'Devolved Government' in PLO Lumumba, MK Mbondenyi and SO Odero (eds), *The Constitution of Kenya: Contemporary Readings* (2011) 203-208. Devolution exercises political, administrative and fiscal powers within the devolved unit.

Court.[156] Several legislations have been enacted to govern the operations of county governments. They include the County Government Act,[157] the Intergovernmental Relations Act,[158] the Transition to Devolved Government Act[159] and the Urban Areas and Cities Act.[160] The State Department of Devolution (the department) within the Office of the Deputy President is responsible for the co-ordination and implementation of devolution policies.[161] The department works with county governments to implement devolution.

Regarding land rights, the Constitution has elaborated on one of the objects of devolution to include recognition of the right by communities to manage their own affairs and protect and promote the interests and rights of minorities and marginalised communities.[162] The governments at county level are responsible for matters concerning land and more particularly community land.[163] The Constitution also confers upon county governments a mandate in county planning and development including housing.[164] The Constitution further provides that any dealings with community land and the extent of land rights of community members is to be determined through legislation.[165] The use of 'legislation' by the Constitution connotes that legislation could be either national or county legislation.[166] The Constitution, in making the provision grants power to parliament to enact legislation to enable county governments to deal with community land.

The Land Laws (Amendment) Act (LLAA)[167] which amended the Land Act[168] assigned county governments a nominal role in protecting communities from forced evictions from

[156] Article 163 (6) of the Constitution. The objects of devolution are provided for in Article 174 of the Constitution. Relevant to this study, the objects of devolution include recognition of the right of communities to manage their own affairs and to further their development and to protect and promote the interests and rights of minorities and marginalised communities.
[157] Act 17 of 2012. The Preamble to the Act states that the legislation aims at giving effect to chapter eleven of the Constitution on devolution and to provide for the powers, functions and responsibilities of county governments.
[158] Act 2 of 2012. The legislation establishes a framework for consultation, co-operation and a mechanism for dispute resolution between the national and county governments.
[159] Act 1 of 2012. The legislation provides the framework for the transition to devolved governments pursuant to the Constitution.
[160] Act 13 of 2011. The legislation gives effect to Article 184 of the Constitution and provides for the classification, governance and management of urban areas and cities and to provide for the principles of governance and public participation in establishment of urban areas.
[161] Republic of Kenya *Executive Order No. 1 on the Organisation of the Government of the Republic of Kenya* (2023) 5.
[162] Article 174 of the Constitution.
[163] M Kangu *Constitutional Law of Kenya on Devolution* (2015) 210.
[164] Fourth Schedule to the Constitution.
[165] Article 63(4) of the Constitution.
[166] Ibid.
[167] LLAA (note 129 above).
[168] Act 6 of 2012.

unregistered community land. The role assigned to county governments does not in any way relate to evictions from public and private land.

The LLAA assigns the County Executive Committee Member (CECM) responsibility for making decisions relating to eviction from unregistered community land. The LLAA provides as follows:

> …the CECM responsible for land matters shall cause a decision relating to an eviction from unregistered community land to be notified to all affected persons, in writing, by notice in the Kenya Gazette and a newspaper with nationwide circulation and by radio announcement, in a local language, where appropriate, at least three months before the eviction.[169]

The provisions in the LLAA relating evictions and the limited role of county governments demonstrate that legislation in Kenya has not created a framework within which county governments should react to and deal with forced evictions. The LLAA also does not outline the roles and responsibilities of municipalities as important components for guarding against forced evictions. Even though communities living on unregistered land are vulnerable, the LLAA does not accord communities adequate protection against forced evictions. The LLAA does not state with clarity what constitutes illegal occupation of unregistered community land or who could be termed as an illegal occupier of such community land.

The LLAA assigns a nominal role to county governments which deals with community land and fails to assign any role in respect of public and private land. The LLAA does not render county governments as active participants in eviction proceedings. County governments, if sufficiently empowered by legislation, can play an important role in eviction proceedings in Courts ensuring that evictions do not result in homelessness.

The ELC in the *Satrose Ayuma* case ordered that there must be a mandatory presence of governmental officials or representatives including Nairobi county government officials and security officers during evictions.[170] The court construed that the county governments had a critical role in eviction proceedings. However, parliament has not legislated the aspect of joinder of county governments in the process of lawful evictions. The concept of joinder in the process of lawful eviction is comprehensively discussed in Chapter 6.[171]

[169] LLAA (note 129 above) Section 152C.
[170] The *Satrose Ayuma* case (note 71 above) Para 111 (e).
[171] Section 6.5.2.1 of Chapter 6.

The Constitution and the Community Land Act (CLA) mandates county governments to hold all unregistered community land on behalf of the communities.[172] The CLA mandates county governments to hold any monies payable as compensation for compulsory acquisition of any unregistered community land, in trust for a community.[173] The monies obtained after compulsory acquisition are supposed to be released to the community upon registration of the community land. The respective county governments shall cease to manage community land upon registration in the name of the particular community.[174] County governments are precluded from selling, disposing, transferring or converting any unregistered community land that they hold in trust on behalf of the communities, for private purposes.[175]

The case of *Mohammed Hussein Yakub & 5 others v County Government of Mandera & 5 others*[176] concerned the role of county governments in protecting unregistered community land. The applicants sought conservatory orders restraining the respondents from acquiring, alienating, disposing and in any way dealing with community land, except in accordance with Article 63(4) of the Constitution and provisions of CLA.[177]

The applicants represented the communities living within Karo Town of Mandera county.[178] They sought redress from the High Court after the county government of Mandera, NLC, KAA and four other government agencies wanted to acquire, alienate and use the land for the construction of an air strip.[179] The applicants further sought a declaration that the land they inhabited was community land and alienation by the county government for construction of an airstrip was contrary to the Constitution and the CLA.[180]

The county government indicated that the land in issue had been set aside for public use, in particular construction of an airstrip.[181] The county government indicated that the land did not

[172] Article 64 (3) of the Constitution. The Article provides that 'any unregistered community land shall be held in trust by county governments on behalf of the communities for which it is held.' See also the Section 6 (1) Community Land Act 27 of 2016 which provides that 'county governments shall hold in trust all unregistered community land on behalf of the communities for which it is held.'
[173] Ibid Section 6 (3).
[174] Ibid Section 6 (7).
[175] Ibid Section 6 (8).
[176] (2020) eKLR.
[177] Ibid Para 2. Article 63 (4) of the Constitution provides that 'community land shall not be disposed of or otherwise used except in terms of legislation specifying the nature and extent of the rights of members of each community individually and collectively.'
[178] Ibid Paras 2 & 3.
[179] Ibid Paras 3 & 4.
[180] Ibid Para 3.
[181] Ibid Para 9.

constitute community land under the Constitution.[182] The county government further argued that the applicants were not members of a registered community as required under Section 7 (2) of the CLA, since in the opinion of the county government; registration is a requisite condition precedent to the recognition, protection and registration of community land rights.[183]

The High Court concurred with the applicants that the subject parcel of land was community land and that the process of compulsory acquisition as enshrined under the law had not been followed in alienating the land for use as a public utility.[184] The High Court observed that it was incumbent upon the county government and the other respondents to demonstrate that the statutory legal process as laid down under the Constitution and the legislation, had been adhered to in alienating the subject land for the purpose of construction of the said airstrip.[185]

The High Court further observed that local or resident communities were entitled to compensation where such land was to be alienated for public use.[186] The High Court declared that alienation of community land and conversion to public land without due process of compulsory acquisition was contrary to the community land legislation.[187] The case is critical since it demonstrates the role of county governments in protecting unregistered community land where communities, which would be vulnerable to arbitrary evictions reside.

The Constitution does not impose duties on county governments such as respecting, protecting and fulfilling those rights that are important in protection against evictions such as housing, among others. Since county governments are important elements in the protection against forced evictions, the law should be reformed to enhance the role of county governments in protecting against forced evictions by making them parties to eviction proceedings in court. This reform would ensure that county governments play a central role in facilitating the determination of whether or not the courts will grant eviction orders. The law can also be reformed to grant county governments to provide alternative housing in instances where evictions are inevitable.

[182] Ibid Paras 17-19.
[183] Ibid Para 20.
[184] Ibid Para 77.
[185] Ibid Para 73.
[186] Ibid Para 75.
[187] Ibid Para 74.

The subsequent section discusses the role independent commissions created by the Constitution and statutes in protection against forced evictions.

5.8 The Role of Independent Commissions in Protection against Forced Evictions

The Constitution establishes independent commissions and independent offices whose objectives are to protect the sovereignty of the people, to secure the observance by all State organs of democratic values and principles and to promote constitutionalism.[188] The commissions and independent offices operate independently from each other and from the executive, legislative and judicial arms and constitute the fourth estate of constitutional governance.[189] They are only subject to the Constitution and are not subject to the direction or control of any person or authority.[190]

Independent commissions provide accountability and monitoring mechanisms that can be essential in protection against forced evictions. Akech observes that accountability and monitoring mechanisms serve certain primary purposes. Firstly, the mechanisms make it possible for the members of the public to hold public officers accountable for their actions and secondly, the mechanisms help prevent abuse of power and illegitimate unjust exercise of governmental power.[191] Thirdly, the mechanisms enhance acceptance and confidence of government authority by the citizenry. Akech elaborates on the importance of monitoring and accountability mechanisms as follows:

> …accountability mechanisms serve the purpose of keeping the agents of the people on their toes, by constantly keeping the agents aware of the fact that they will be called upon to account for their actions, thereby helping the people to prevent abuses of power and corruption. The mechanisms also serve the important goal of legitimising government in the perception of the citizenry by promoting acceptance of government authority and confidence in the government.[192]

Some independent commissions are established pursuant to the Principles relating to the Status of National Institutions (Paris Principles).[193] The Paris Principles provide for the minimum standards for development and operation of national human rights institutions

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[188] Article 249 (1) of the Constitution.

[189] E Opiyo & E Wabwoto 'Limits on State Power: Examining the Role of Independent Commissions and Offices under the Constitution of Kenya' (2015) 11(2) *Law Society of Kenya Journal* 130.

[190] Ibid.

[191] M Akech 'Abuse of Power and Corruption in Kenya: Will the New Constitution Enhance Government Accountability' (2011) 18(1) *Indiana Journal of Global Legal Studies* 345-346.

[192] Ibid.

[193] UN Doc E/CN.4/1992/43 9 October 1991. The Paris Principles were adopted by the UN General Assembly Resolution 48/134 of 20 December 1993.

(NHRIs) and require that the institutions be given a broad mandate to protect and promote human rights.[194]

The Constitution establishes national human rights institutions. The Constitution establishes the Kenya National Human Rights and Equality Commission (KNHREC).[195] KNHREC is responsible for advising and monitoring progress on the realisation of all rights enshrined in the Constitution.[196] It is mandated to promote, protect and ensure observance of human rights in public and private institutions by ensuring compliance with obligations under ratified international treaties and conventions relating to human rights.[197] Pursuant to the establishment of the KNHREC by the Constitution, parliament has established the Kenya National Commission on Human Rights, the National Gender and Equality Commission and the Commission on Administrative Justice (Ombudsman).

The following section evaluates the roles of the institutions created under the KNHREC in protection against forced evictions.

5.8.1 Kenya National Commission on Human Rights (KNCHR)

The KNCHR is established by the Kenya National Commission on Human Rights Act to promote and protect human rights and for associated purposes.[198] Relevant to the discussion regarding forced evictions, the KNCHR is mandated to act as the chief agent in compliance with obligations under international treaties and conventions on human rights and recommend to parliament effective measures to promote human rights.[199] KNCHR advises parliament on enactment of legislation to promote human rights. The KNCHR complements the efforts of other institutions working in the field of human rights and cooperates with such other institutions for the purpose of promoting and protecting human rights in Kenya.[200]

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[194] Ibid Article 1; CJ Peterson 'The Paris Principles And Human Rights Institutions: Is Hong Kong Slipping Further Away from the Mark?' (2003) 33 *Hong Kong Law Journal* 514; M Akech *Privatization and Democracy in East Africa: The Promise of Administrative Law* (2009)124-125.

[195] Article 59 of the Constitution. The Article establishes the Kenya National Human Rights and Equality Commission. Sub-article 4 provides that parliament shall enact legislation to restructure the Commission into two or more separate commissions. The study will also review their enabling legislation.

[196] Ibid Article 59 (g).

[197] Ibid Article 59 (c).

[198] Act 14 of 2011. See the Preamble.

[199] Ibid Section 16 (1) f.

[200] Ibid Section 8 (h). KNCHR works with the NGEC and the CAJ to ensure efficiency, effectiveness and complementarity in their activities and to establish mechanisms for referrals and collaboration.

The KNCHR continuously monitors and documents cases of forced evictions in Kenya.[201] The KNCHR documented forced evictions of indigenous peoples and communities living in forests.[202] The KNCHR observed that forced evictions were carried out by the government in forest areas of Kenya rendering communities homeless and causing destruction of property.[203] The KNCHR observed that the government had forcibly evicted communities comprising poor families from forest land and subsequently allocated some parcels to political actors.[204]

The KNCHR recommended that the government formulate the national guidelines on evictions to guide plans and legislation with regard to evictions and more particularly in forest areas.[205] It recommended that the government should put in place a comprehensive relocation and compensation plan for any proposed evictions including forest areas and establish policy and legislation that offers alternatives to evictions and community participation before any intended eviction takes place particularly in forest areas.[206]

In 2018, the KNCHR wrote an alternative report with the aim of implementation of both legislative and administrative measures geared towards the protection of rights of indigenous peoples.[207] KNCHR observed that indigenous peoples suffered violence as a result of and forced evictions conducted by the State and recommended that the State should take measures to protect indigenous peoples and ensure their security by taking action on cases of harassment, assault, violence and forced evictions.[208] The KNCHR further observed that forced evictions of indigenous peoples from their ancestral lands were carried out in the face of court orders stopping the eviction.[209]

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[201] KNCHR *Handbook on Forced Evictions in Kenya: Roles and Responsibilities of the Government (National and County) and Private Developers* (2014). See also <www.knchr.org> accessed 30 July 2022.
[202] KNCHR, Amnesty International, the Centre on Housing Rights and Evictions (COHRE), Hakijamii and the Kenya Land Alliance *Nowhere to go Forced evictions in Mau Forest, Kenya* (2007).
[203] Ibid 7.
[204] Ibid 20.
[205] Ibid 21.
[206] Ibid.
[207] KNCHR '*Submissions to the United Nations Permanent Forum on Indigenous Issues on Actions Taken or Planned Related to the Recommendations of the Permanent Forum, Implementation of UN Declaration on Indigenous Peoples and the Outcome Document of the World Conference on Indigenous Peoples* (2018).
[208] Ibid 2.
[209] Ibid 3.

The KNCHR made far reaching recommendations which include ratification of the ILO Convention 169 on Indigenous and Tribal Peoples,[210] implementation of the UN Declaration on the Rights of Indigenous People (UNDRIP) and enactment of the Eviction and Resettlement Procedure Bill by parliament.[211] It further recommended the full implementation of the *Endorois* decision handed down by the ACHPR which recognises indigenous peoples' rights on ancestral land.

The KNCHR enhances the realisation of economic, cultural and social rights through ensuring enactment and implementation of laws and policies.[212] KNCHR is vested with the power to investigate complaints of all human rights abuses including SERs, seek appropriate redress for the violations and fundamentally advise the government on their human rights obligations and to ensure State compliance with regional and international human rights treaty obligations.[213] KNCHR as a quasi-judicial may summon witnesses during investigations.

The role of the KNCHR is significant in the protection against evictions. KNCHR has demonstrated competence in utilising its constitutional and legislative mandate to protect human rights, including forced evictions. However, the role of the KNCHR can be enhanced to better protect against forced evictions. This can be done through increased capacity building to ensure compliance with international and regional human rights obligations on evictions through rigorous advocating for ratification, domestication and reporting on the instruments. Enhancing the role of KNCHR can help mitigate systemic forced evictions.

5.8.2 Commission on Administrative Justice (CAJ)/Ombudsman

CAJ is established under the Commission on Administrative Justice Act.[214] CAJ, also known as the office of the ombudsman, is mandated to enforce administrative justice and promote constitutional values in the public sector by addressing maladministration through effective

[210] ILO Convention 169 on Indigenous and Tribal Peoples is the only legally binding instrument that addresses the plight of indigenous peoples. See the ILO *Convention (No 169) Concerning Indigenous and Tribal Peoples in Independent Countries* (1989) (Adopted by the International Labour Conference on 27 June 1989 and entered into force on 5 September 1991).
[211] UNGA 'United Nations Declaration on the Rights of Indigenous Peoples (2011) UN Doc A/RES/66/142. See also the Eviction and Resettlement Procedure Bill (note 128 above).
[212] Article 59 of the Constitution.
[213] The KNCHR Act (note 198 above) Section 28.
[214] Act 102A of 2011.

complaints handling and dispute resolution.[215] The CAJ makes inquiries into maladministration in public offices within the national and county governments. Upon making inquiries, CAJ issues advisory opinions on review of legislation, processes and procedures in public administration.[216] It further participates in strategic public interest litigation on matters of national importance before courts as a way of promoting public administration.[217]

CAJ receives complaints from aggrieved citizens against government officials or agencies, investigates the complaints and recommends corrective measures in order to remedy the grievances and issue reports.[218] Even though the ombudsman recommends remedial measures, the recommendations are not binding on the administration but compliance is based on a voluntary basis upon the support of other governmental structures.[219] The role of the ombudsman in protection of human rights is limited by the fact that it makes decisions that are not binding and implemented on the mercy of other government structures.

Relevant to the study on protection against forced evictions and the right to housing the CAJ is mandated to 'take appropriate steps in conjunction with other State organs and commissions responsible for the protection and promotion of human rights to facilitate promotion and protection of the fundamental rights and freedoms of the individual in public administration'.[220] Conceptually, the CAJ is mandated to protect the right to housing as part of human rights. It is envisaged that by protecting the right to housing, CAJ has the potential to protect against forced evictions. The CAJ limits its jurisdiction to public institutions and does not have jurisdiction over matters pending before courts or judicial tribunals.[221] The CAJ is given power to monitor the performance of ministries, departments and agencies and implements the government performance contracting programme.[222]

CAJ can be strengthened to make it more effective by giving legislative mandate that ensures enforcement of its findings and recommendations. CAJ does not have adequate powers to

[215] Ibid Section 8 (e).
[216] Ibid Section 8 (a).
[217] CAJ *Righting Administrative Wrongs: A Compendium of Advisories, Determinations and Case Law by the Kenyan Ombudsman* (2016) iii.
[218] Mbianda (note 25 above) 14.
[219] Ibid 11.
[220] M Akech *Administrative Law* (2016) 404.
[221] Ibid Section 30.
[222] CAJ Act (note 214 above) Section 8.

ensure enforcement of its decisions beyond making recommendations to the relevant State agencies. Parliament should extend the mandate of the CAJ to include court action to seek appropriate remedy for the enforcement of its decisions.

5.9 Conclusion

This chapter evaluated the institutional initiatives for the protection against forced evictions in Kenya. The chapter discussed the roles of the national and devolved county governments as well as the roles of the executive, the legislature and the judiciary in protection against forced evictions. The chapter also discussed the role of quasi-government institutions and constitutional commissions in protecting against forced evictions. It demonstrated that institutions can play a significant role in protection from forced evictions.

Institutions established by the Constitution and legislation have not always acted in the public interest. Apart from the courts that have demonstrated progressive jurisprudence that they protect against forced evictions, other institutions such as the legislature have not enacted relevant legislation that are in tandem with international human rights standards. Even though the legislature made amendments to the Land Act through the LLAA to incorporate aspects of forced evictions, the legislature failed to enact the ERPB into law. The executive has not taken steps through the relevant government agencies to ensure that the legislature passes the Bill into law.

The legal framework that created county governments and constitutional commissions has not specifically mandated the institutions to protect against forced evictions. The legal framework that establishes county governments does not create a framework within which the institutions can address the problem of forced evictions. The study established that the institutional framework dealing with land and housing is not effective in addressing the issue of forced evictions. The institutions do not adequately protect communities and individuals from forced evictions.

The next chapter draws on lessons that Kenya can learn from South Africa on addressing the problem of forced evictions. The chapter evaluates the constitutional and legislative framework on evictions. It also includes jurisprudence and recent developments in South Africa that have helped mitigate forced evictions. The purpose of the chapter is to elicit best practices that can be incorporated within the Kenyan legal framework on land rights and protection from forced evictions.

CHAPTER 6:
BEST PRACTICES FROM A COMPARABLE JURISDICTION: PROTECTION AGAINST FORCED EVICTIONS IN SOUTH AFRICA

6.1 Introduction

The problem of forced evictions is not unique to Kenya. Many African countries have experienced the problem. Some States have put in place the necessary legal framework and significant norms on evictions and jurisprudence in respect of forced evictions that adhere to international human rights standards. Such legal framework, norms and jurisprudence are important and may assist in informing legislative reforms in Kenya to better protect against forced evictions. The study will recommend the incorporation of the practices in respect of land rights and mitigation of forced evictions in the Kenyan legal system.

This chapter draws on lessons from South Africa on the reforms that can inform protection against forced evictions in Kenya. South Africa has been chosen because it has experienced forms of forced evictions and has developed laws, norms and jurisprudence that Kenya can learn from. South Africa has adjudicated substantial cases and developed comprehensive jurisprudence on socio-economic rights (SERs).[1]

Christiansen observes that the judiciary in South Africa has enforced SERs through traditional court procedures within its regular judicial system.[2] Christiansen has also observed that South Africa, through her Constitution, adopted social welfare provisions in the form of SERs that are enforceable by courts.[3] In South Africa, forced evictions and the right to housing legislation and jurisprudence are well developed because Section 26 of the Constitution of South Africa 1996.[4] Section 26 relates to evictions and the right to housing, and is most litigated among the SERs.[5] The constitutional recognition of housing rights provided a firm foundation for transforming eviction laws in South Africa.[6] This has led to development of a wealth of jurisprudence in the protection from forced evictions which Kenya can learn from. Williams observes that the Constitutional Court has developed evictions and housing rights jurisprudence more than any jurisprudence regarding other SERs

[1] EC Christiansen 'Using Constitutional Adjudication to Remedy Socio-Economic Injustice: Comparative Lessons from South Africa' *(*2008) 13 *UCLA Journal of International Law and Foreign Affairs* 376.
[2] Ibid 377.
[3] Ibid 376.
[4] The Constitution of the Republic of South Africa 1996 (hereinafter referred to as the Constitution).
[5] Socio-Economic Rights Institute of South Africa (SERI) *Evictions and Alternative Accommodation in South Africa: An Analysis of the Jurisprudence and Implications for Local Government* (2013) 7-8.
[6] S Liebenberg *Socio-Economic Rights Adjudication under a Transformative Constitution* (2010).

contained in the Bill of Rights.[7] Development of such jurisprudence by the Court was informed by prevalence of forced removals and evictions during the apartheid era.[8]

South Africa has been hailed for its housing laws, policies, jurisprudence and programmes which have been modelled on international best standards and practices.[9] Chenwi compares the laws and policies relating to evictions during the apartheid era and the current situation and states that:

> …South Africa's housing policy and strategy is aimed at transforming the extremely fragmented, complex and racially based South African human settlement environment. Apartheid laws and policies contributed to this fragmented and racially based human settlement environment, especially as they facilitated, among other things, unequal approaches to housing for each race group and the eviction and relocation of people to racially defined areas.[10]

From the foregoing, South Africa has adopted laws on tenure security, policies and strategies on evictions which can inform best practices in reforming Kenyan law to safeguard the rights of the vulnerable from the problem of forced evictions.

The courts in South Africa have also interpreted legislation that regulates evictions in a way that promotes the values and the interests that have been protected by the Constitution. Decisions by the courts have elaborated the role of State organs in evictions sought by private parties against unlawful occupiers.[11] The courts have handed down progressive judgments on the aspect of joinder of local authorities in eviction applications sought by private parties.[12] Municipalities are also entrusted with the duty to place information before the courts to enable them to consider what is just and equitable during evictions.[13]

The chapter evaluates the forced eviction provisions in the Constitution and legislation enacted pursuant to the constitutional guarantees in the Bill of Rights. It further evaluates jurisprudence and judicial developments which will help inform best practices that can be potentially entrenched in the Kenyan legal system. This chapter discusses developments

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[7] LA Williams 'The Right to Housing in South Africa: An Evolving Jurisprudence' (2014) 45(3) *Columbia Human Rights Law Review* 819-820.
[8] Ibid.
[9] L Chenwi 'Implementation of Housing Rights in South Africa: Approaches and Strategies' (2015) 24 *Journal of Law and Social Policy* 71; L Stewart 'Adjudicating Socio-Economic Rights under a Transformative Constitution' (2010) 28(3) *Penn State International Law Review* 491.
[10] Ibid.
[11] *President of the Republic of South Africa and Another v Modderklip Boardery Pty Limited* 2005 (5) SA 3 (CC) Para 12.
[12] J Van Wyk 'The Role of Local Government in Evictions' (2011) 14(3) *Potchefstroom Electronic Law Journal* 60-62.
[13] Ibid 62.

made by the South African courts that would help address the problem of forced evictions if entrenched in the Kenyan legal framework. The developments include constitutional law developments such as meaningful engagement, joinder of municipalities in eviction proceedings and provision of adequate alternative accommodation. The development of housing and eviction jurisprudence buttressed the right to dignity in the Bill of Rights and has enhanced protection against forced evictions.

The chapter is arranged as follows: Section 6.1 introduces the chapter. Section 6.2 evaluates the current legal framework on evictions. The section begins by discussing the constitutional framework for protection against forced evictions under the Constitution. It discusses the Prevention of Illegal Eviction from and Unlawful Occupation of Land Act (PIE)[14] and Extension of Security of Tenure Act (ESTA).[15] Section 6.4 discusses protection of traditional communities who do not have formal rights to land. The section evaluates the Interim Protection of Informal Land Rights Act (IPILRA)[16] and jurisprudence on protection of indigenous peoples' land rights in communal areas.

Section 6.5 discusses the process of lawful eviction in South Africa. The section evaluates the role of municipalities in the processes of eviction. It discusses meaningful engagement and the role of municipalities in protection against arbitrary evictions. On the role of municipalities, the section evaluates joinder of municipalities in eviction proceedings and the constitutional and statutory role of municipalities in the provision of adequate alternative accommodation and emergency temporary accommodation to prevent homelessness.

Meaningful engagement, joinder of municipalities in eviction proceedings and provision of alternative accommodation are important aspects that the courts in South Africa have developed as a bulwark in protection against forced evictions in South Africa. Section 6.6 concludes by drawing best practices from the South African legal regime on protection against forced evictions. The main question to be addressed is what Kenya can learn from South Africa to address the problem of forced evictions. The chapter argues that applied cumulatively, the Constitution, legislation and jurisprudence on forced evictions in South Africa have substantially expanded the opportunities for individuals and communities to protect themselves from forced evictions in instances of unlawful occupation of land and to

[14] Land Act 19 of 1998.
[15] Act 62 of 1997.
[16] Act 31 of 1996.

avoid homelessness by granting the right to housing which is an important component in protection against arbitrary evictions.

6.2 South African Legal Framework for Protection against Forced Evictions

6.2.1 The Constitution of South Africa

The Constitution is the supreme law and binds all the State organs including the executive, the legislature and the judiciary.[17] Section 2 provides states that:

> … this Constitution is the supreme law of the Republic; law or conduct inconsistent with it is invalid, and the obligations imposed by it must be fulfilled.[18]

The Constitution is renowned internationally for its holistic, inclusive Bill of Rights and a comprehensive set of SERs.[19] SERs are enforceable by the courts which in turn have a wide discretion to grant just and equitable remedies.[20]

Klare acknowledged that the Constitution is a progressive and transformative legal instrument which regulates public power and creates a normative value system in the post-apartheid society.[21] The Constitution brought far reaching changes in protection afforded to unlawful occupiers in respect of forced evictions by entrenching the right to adequate housing.[22] The Constitution also influenced the paradigm shift on eviction laws from a position where the apartheid regime would use common law to evict occupiers of land by just proving ownership to a position where, considering all relevant circumstances, justice and equity are critical requirements before courts can issue eviction orders.[23]

The following section discusses protection against forced evictions and the right to housing under Section 26 of the Constitution and in particular, the principles laid out by the courts that Kenya can learn from.

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[17] Ibid Section 7(2).

[18] Section 2 of the Constitution.

[19] S Liebenberg 'Adjudicating Social Rights under a Transformative Constitution' in M Langford (ed) *Social Rights Jurisprudence: Emerging Trends in International and Comparative Law* (2009) 75.

[20] Ibid.

[21] KE Klare 'Legal Culture and Transformative Constitutionalism' (1998) 14 *South African Journal on Human Rights* 146.

[22] SERI (note 5 above) 7.

[23] C O'Regan 'No More Forced Removals? An Historical Analysis of the Prevention of Illegal Squatting Act' (1989) 5 *South African Journal of Human Rights* 361; Wilson 'Breaking the Tie: Evictions from Private Land, Homelessness and a New Normality' (2009) 126 (2) *South African Law Journal* 270-275.

6.2.1.1 Protection against Forced Eviction under the Constitution

The Constitution provides for the right of access to adequate housing in the Bill of Rights.[24] Section 26 (1) of the Constitution provides for the right of access to housing rather than the right to adequate housing. The Bill of Rights also entrenched the right to human dignity[25] and the right to property.[26] The Constitution obligates the State to enact appropriate legislation and adopt measures, within the available resources, to achieve the progressive realisation of the right to housing.[27] The Constitution further provides that no one may be evicted from their home, or have their home demolished, without an order of court, made after the court considers all the relevant circumstances, and further prohibits enactment of legislation that may permit arbitrary evictions.[28]

Currie and De Waal have argued that the Constitution has entrenched the right to housing, unqualified by considerations relating to the State's available resources, as a conventional negative right against arbitrary evictions.[29] The right to housing prohibits anyone from carrying out evictions or demolitions without an order of court.[30] The right further obligates the courts to consider all the relevant circumstances and prohibits State organs from enacting legislation that may permit arbitrary evictions.[31]

Section 26 (3) of the Constitution protects against evictions. The section states that:

> …no one may be evicted from their home, or have their home demolished, without an order of court made after considering all the relevant circumstances. No legislation may permit arbitrary evictions.

The Constitution prohibits eviction or demolition of a person's home unless the court has issued an order after considering all the relevant circumstances. The provision implies that forced evictions can only be carried out after the court grants an order and not just after

[24] Section 26 (1) of the Constitution.
[25] Ibid Section 10. It provides that 'everyone has inherent dignity and the right to have their dignity respected and protected.'
[26] Ibid Section 25. Sub Section 1 provides that 'no one may be deprived of property except in terms of law of general application, and no law may permit arbitrary deprivation of property.'
[27] Ibid Section 26 (2).
[28] Ibid Section 26 (3).
[29] I Currie & J de Waal *The Bill of Rights Handbook* (2013) 586.
[30] Section 26 (3) of the Constitution.
[31] Ibid.

administrative decisions alone.[32] This section makes it clear that the legislature cannot enact legislation that permits arbitrary evictions.

The Constitutional Court developed principles for protection from forced evictions in *the Government of the Republic of South Africa v Grootboom*.[33] The case concerned people who had illegally occupied private land after living in appalling conditions elsewhere.[34] Mrs. Grootboom and the other affected parties (the applicants) in the case were rendered homeless after they were forcefully evicted from the houses in order to pave way for low-cost housing.[35]

The Court interpreted the State's obligation to take measures, within the available resources to achieve the progressive realisation of this right to housing.[36] The Court developed the model of reasonableness review, a useful tool that determines the reasonableness of the measures the government takes to realise the rights under Section 26 of the Constitution.[37] The Court rejected the minimum core approach proposed by *amici.*[38] *Amici* had argued that Section 26 imposed a minimum core obligation on the State, to ensure that everyone has access to the essential basic levels of the right to housing.[39]

The Court set out the parameters of a reasonable housing policy as one which is comprehensive, coherent and directed towards progressive realisation of the right of access to adequate housing within the State's available resources.[40] The policy, according to the Court, must respond to the needs of the most vulnerable people in the society, take a phased approach with short, medium and long term plans as well as allocating responsibilities to the different spheres of government and ensure availability of appropriate financial and human resources.[41] Additionally, the policy must be sufficiently flexible to respond to those in

[32] Currie & de Waal (note 29 above) 587.
[33] 2001 (1) SA 46 (CC).
[34] Ibid Para 2.
[35] Ibid Para 3.
[36] Ibid Para 4.
[37] G Musila 'Testing Two Standards of Compliance: A Modest Proposal on the Adjudication of Positive Socio-economic Rights under the New Constitution' in JO Ambani (ed) *Judiciary Watch Report: Readings on the Rule of Law in Africa* (2008) 76.
[38] The amici in the case were the South African Human Rights Commission (SAHRC) and the Community Law Centre of the University of the Western Cape. See M Langford 'The Justiciability of Social Rights: From Practice to Theory' in M Langford (ed) *Social Rights Jurisprudence: Emerging Trends in International and Comparative Law* (2009) 22.
[39] The *Grootboom case* (note 33 above) Paras 17 & 18.
[40] Ibid Paras 41 & 96.
[41] Ibid Para 39.

desperate need and be capable of addressing immediate and short-term requirements appropriately within the context of the housing need to be addressed.[42]

The Court elaborated that the State is supposed to operate within the available resources and that the obligation to provide housing as an element of protection against arbitrary evictions does not require the State to do more than the available resources permit.[43] Additionally, The Court observes that Section 26 (2) does not envisage more than is realistic within available resources by the State to realise the rights immediately.[44] The Court interpreted the word access in Section 26 of the Constitution to mean that the State could also fulfil its obligations by enabling people to provide their own housing and stated that:

> …a right of access to adequate housing also suggests that it is not only the State that is responsible for the provision of houses, but that other agents within our society, including individuals themselves, must be enabled by legislative and other measures to provide housing. The State must create the conditions for access to adequate housing for people at all economic levels of our society. State policy dealing with housing must therefore take account of different economic levels in our society.[45]

The Court further explained that using a phased approach which includes short, medium and long term plans is an important parameter of a reasonable housing policy. The policy must make short term provision for people who urgently need housing and are living in deplorable conditions.[46] The Court declared failure by the State to have a plan for the most vulnerable segment of the society and failure to find alternative shelter breached Section 26 (2) of the Constitution.[47]

Liebenberg observes that the *Grootboom* case developed criteria for assessing the reasonableness of the acts and omissions of the State.[48] She also observes that the case lays emphasis on the aspect of human dignity as an important aspect of protection against forced evictions. Quinot and Liebenberg observe that human dignity is the value-based underpinning

[42] Ibid Para 56.
[43] Ibid Para 46.
[44] Ibid.
[45] Ibid Para 34.
[46] Ibid Paras 44 & 64.
[47] Ibid Para 44. Section 26 (2) requires the state to devise and implement within its available resources a comprehensive and coordinated programme progressively to realise the right of access to adequate housing.
[48] Liebenberg (note 6 above) 151-152.

of the Court's key finding in the *Grootboom* case that reasonableness requires minimum interventions to the vulnerable that live in intolerable conditions or crisis situations.[49]

The Court found that the State did not comply with Section 26 (1) and (2) of the Constitution which guarantees the right to housing.[50] The Court ruled that the right to housing cannot be isolated from other SERs and the State is obligated to take positive action to address the needs of the people living in homelessness and extreme poverty.[51] The Court established that the State, persons and all other entities have been given a negative obligation to desist from preventing or impairing the right of access to adequate housing.[52] The Court issued a declaratory order requiring the State to meet the obligation imposed upon it by Section 26 (2) by devising, funding, implementing and supervising measures that provide relief to occupiers in desperate need.[53]

The *Grootboom* case elaborated the right to housing as an important component of protection against forced evictions within the South African context. Significantly, within the eviction and housing context, the case assesses reasonableness to addressing the issues within the context of the social and economic context as well as capacity of institutions and available resources. The Court laid out important principles that can also be applicable within the Kenyan context. The case underscored the role of the State in ameliorating the plight of people living in deplorable conditions by providing access to housing, health care, food, water and social security for them and their dependants. The case set in motion a critical development in the right to housing by requiring the State to provide at least temporary shelter to people affected by evictions.

Section 26 (3) of the Constitution and the *Grootboom* case offer useful lessons that can guide legislative and judicial protection of the right to housing that can buttress protection against arbitrary evictions in Kenya. Firstly, the case underscored the role of the State in ensuring access to land on an equitable basis. Secondly, the case demonstrated that the right of access

[49] G Quinot & S Liebenberg 'Narrowing the Band: Reasonableness Review in Administrative Justice and Socio-Economic Rights Jurisprudence in South Africa' (2011) 22 (3) *Stellenbosch Law Review* 654-655; Currie & de Waal (note 29 above) 587.

[50] Ibid Para 95. The Court stated that 'Section 26 does oblige the state to devise and implement a coherent, coordinated programme designed to meet its Section 26 obligation. The Court further stated that the State is obligated to fund, devise, implement and supervise measures to implement the provisions of Section 26.

[51] Ibid Para 24.

[52] Ibid Para 34; Liebenberg (note 6 above) 79. Liebenberg notes that the negative duty is further spelt out in Section 26(3) which prohibits arbitrary evictions.

[53] Ibid Para 96.

to adequate housing does not isolate other rights such as the right to human dignity, freedom, equality, food and clothing. Thirdly, the case expanded the right to housing to include aspects of personal intimacy, security and family as important components and concepts of home to imply that housing is significant, not only as a basic human need but also as a fundamental right which has to be protected by law.

The following section evaluates the legislative framework for protection against forced evictions.

6.3 Legislative Framework for Protection against Forced Evictions

South Africa has enacted pieces of legislation to give effect to Section 26 (3) of the Constitution. The study evaluates three pieces of legislation which include PIE,[54] ESTA[55] IPILRA.[56] PIE protects unlawful occupiers of rural or urban land from eviction. ESTA on the other hand grants various forms of protection against eviction to occupiers of rural land who have some form of consent to occupy. IPILRA offers protection to indigenous peoples from eviction.

6.3.1 Prevention of Illegal Eviction from and Unlawful Occupation

PIE is the substantive legislation on evictions in South Africa and was enacted to prohibit unlawful eviction, to protect unlawful occupiers from evictions and to repeal obsolete eviction laws that were enacted during the apartheid period.'[57] PIE was enacted to give effect to Section 26 (3) of the Constitution on protection against forced evictions for unlawful occupiers and prevention abuse of power by State and non-state agents who may carry out unlawful evictions. It defines an unlawful occupier as a 'person who occupies land without the express or tacit consent of the owner or person in charge, or without any other right in law to occupy such land, excluding a person who is an occupier in terms of ESTA'.[58]

The preamble to the Act makes it clear that evictions and demolition of homes cannot be carried out without a court order issued after considering all the relevant circumstances.[59] The preamble also states that the law should balance the interests of unlawful occupiers and the

[54] PIE (note 14 above).
[55] ESTA (note 15 above).
[56] IPILRA (note 16 above).
[57] PIE (note 14 above).
[58] Ibid Section 1.
[59] Ibid the Preamble.

rights of landowners to apply for eviction orders in appropriate circumstances.[60] The preamble gives special recognition to the elderly, people living with disability, children, and households headed by women during the process of eviction.[61]

PIE defines eviction as the act of 'depriving a person of occupation of a building or structure, or the land on which such building or structure is erected, against his or her will'.[62] PIE provides the procedure for eviction of unlawful occupiers. It stipulates that the owner of land can institute proceedings for evictions of unlawful occupiers. PIE provides that the court must serve written and effective notice of the proceedings on the unlawful occupier and the municipality at least 14 days before the hearing of the proceedings.[63] The procedure of service of notice contemplated by PIE is what the court prescribes. The court is under obligation to consider the rights of the unlawful occupiers to receive adequate notice that enable them to defend the case.[64]

PIE elaborated the procedural requirements for issuance of adequate notice to the occupiers. It states that the court must be satisfied that the notice to the unlawful occupier is clear on the intended purpose, indicates the date and time the court will hear the proceedings and indicates the grounds for the proposed eviction.[65] The notice must indicate that the unlawful occupier has the right to be present during the court proceedings and has the right to apply for legal aid.[66]

PIE provides that the court is under obligation to consider the duration of occupation for the unlawful occupiers. In the event that the unlawful occupiers have occupied the land for a period not exceeding six months, at the time when the owner or person in charge of the land has instituted eviction proceedings, the court must taking into account all relevant circumstances including the rights and needs of the elderly, children, disabled persons and households headed by women.[67]

In instances where unlawful occupiers have occupied land for a period exceeding six months at the time when the owner or person in charge of the land instituted the eviction proceedings,

[60] Ibid.
[61] Ibid.
[62] Ibid Section 1.
[63] Ibid Section 4(2).
[64] Ibid Section 4(4).
[65] Ibid Section 5 (a) to (c).
[66] Ibid Section 5 (d).
[67] Ibid Section 6.

the court may grant an eviction order after considering all the relevant circumstances.[68] The only exception is instances where the land is sold in a sale of execution pursuant to a mortgage.[69] The court is under obligation to consider whether the land has been made available or may reasonably be made available by a municipality or other organ of State or another land owner, for relocation of the unlawful occupiers.[70]

PIE enables owners or persons in charge of the land to institute urgent proceedings for the eviction of unlawful occupiers. The court may grant an eviction order from land pending the outcome of proceedings if it is satisfied that there is danger to persons or properties if the unlawful occupier is not evicted from the land.[71] The court may also grant such an order if no other effective remedy is available.

Organs of the State may institute proceedings to evict unlawful occupiers who occupy land that falls within their jurisdiction in terms of PIE. The exception to this rule applies in instances where the unlawful occupier is a mortgagor and the land in question is sold in a sale of execution pursuant to a mortgage.[72] The court, in granting the eviction order must consider the relevant circumstances, which include whether the unlawful occupier occupied without consent of that organ of State and whether it is in the public interest to grant such an order.[73]

According to PIE, the court must consider justice and equity as well as all relevant circumstances before issuing an eviction order. In the *Port Elizabeth Municipality v Various Occupiers* case,[74] the Constitutional Court stated that justice and equity have to be applied within a defined constitutional matrix. PIE has to be interpreted within the bounds provided by the Constitution. The Court stated that:

> …in this context, PIE cannot simply be looked at as a legislative mechanism designed to restore common-law property rights by freeing them of racist and authoritarian provisions, though that is one of its aspects. Nor is it just a means of promoting judicial philanthropy in favour of the poor, though compassion is built into its very structure. PIE has to be understood, and its governing concepts of justice and equity have to be applied, within a defined and carefully calibrated constitutional matrix.[75]

[68] Ibid Section 7.
[69] Ibid.
[70] Ibid.
[71] Ibid Section 8.
[72] Ibid Section
[73] Ibid Section 6 (2).
[74] 2005(1) SA 217 (CC).
[75] Ibid Para 14.

The case concerned illegal occupants who erected and lived in shacks on privately owned land within the municipality. The people who resided in the neighbourhood, the owners of the property and the municipality sought an eviction order against the unlawful occupiers in the High Court.[76] The occupiers stated that they had lived on the land for periods between two and eight years after being evicted from other parcels of land.[77] The High Court held that the occupiers were unlawfully occupying the property and that it was in the public interest that their unlawful occupation be terminated.[78] The High Court, upon considering all the relevant statutory considerations declined to grant the relief sought by the unlawful occupiers and ordered the occupiers to vacate the land and pay the costs of the proceedings.[79]

The occupiers appealed the matter at the Supreme Court of Appeal (SCA) which held that the occupiers were not seeking preferential treatment from the municipality but were merely requesting alternative land to put up their houses with some measure of security of tenure.[80] The SCA underscored the essence of availability of suitable alternative land for the occupiers. The SCA stated that the occupiers had lived on the land for a long time and additionally, the eviction order was not sought by the owners of the property but by an organ of State on behalf of the owners.[81] The SCA upheld the appeal and set aside the eviction order.

The SCA further interpreted PIE to progressively offer protection to the occupiers. The SCA stated that PIE was enacted to prevent abuses and ensure that evictions were carried out in a manner consistent with the values of the new constitutional dispensation.[82] According to the SCA, the enactment of PIE was significant since it gave the courts the role of balancing between illegal eviction and unlawful occupation.[83] PIE provides guidance on how they should fulfil the constitutionally mandated role of protection against arbitrary evictions. The SCA's decision is significant since unlawful occupiers become bearers of constitutional

[76] Ibid Para 1.
[77] Ibid Para 2.
[78] Ibid Para 4.
[79] Ibid.
[80] Ibid Para 5.
[81] Ibid.
[82] Ibid Para 13.
[83] Ibid; AJ van der Walt & S Viljoens 'The Constitutional Mandate for Social Welfare – Systemic Differences and Links Between Property, Land Rights And Housing Rights' (2015) 18 (4) *Potchefstroom Electronic Law Journal* 1054-1062.

rights which confer upon them substantive and procedural protections in the event that eviction from their homes becomes inevitable.[84]

PIE offers adequate safeguard to unlawful occupiers by provision of the requirement that must be just and equitable. PIE requires courts to ascertain the availability of alternative accommodation or that it can reasonably be made available to unlawful occupiers upon eviction. The requirement and incorporation of mediation between the unlawful occupiers and land owners by PIE is a significant development in eviction law in South Africa.

The Constitutional Court in the *Modderklip* case[85] addressed the issue of eviction from private land. The Court dealt with the obligation of the State to facilitate private landowners to execute eviction orders against unlawful occupiers on their properties as well the obligations towards illegal occupiers. The case concerned occupation of land by unlawful occupiers on a private parcel of land. The illegal occupants settled on the land in the year 2000 after being evicted from another informal settlement.[86] Before the end of that year, the number of illegal occupants had grown to 18 000 people living in 4 000 shacks.[87] The council alerted Modderklip to the unlawful occupation of its land and gave it notice in terms of Section 6 (4) of PIE, requiring it to institute eviction proceedings against the unlawful occupiers.[88] Modderklip declined to evict the occupiers even though it undertook to cooperate with the council to take the necessary steps to evict the occupiers.[89]

Modderklip subsequently instituted proceedings in the High Court for an eviction order in terms of PIE within a period of six months of the initial occupation of its property. The High Court granted the eviction order and gave the occupiers two months within which to vacate.[90] The High Court further ordered the demolition of the informal dwellings although the order was not complied to and the number of the inhabitants of the informal settlement within Modderklip's farm continued to grow.[91] Modderklip made a further application to compel the

[84] Liebenberg (note 6 above) 277.
[85] The *Modderklip* case (note 11 above).
[86] Ibid Paras 3 & 6.
[87] Ibid Para 3.
[88] Ibid Para 4. Section 6 (4) of PIE provides that 'an organ of state may, before instituting such proceedings, give not less than 14 days' written notice to the owner or person in charge of the land to institute proceedings for the eviction of the unlawful occupier.'
[89] Ibid.
[90] Ibid Para 7.
[91] Ibid.

State to execute the eviction order. The High Court held that the State was in breach of its constitutional obligations by failing to effect the eviction order.[92]

The *Modderklip* case was appealed to the Supreme Court of Appeal. The SCA struck the balance between the property rights under Section 25 and the protection from forced evictions under Section 26 (3) of the Constitution. SCA held that the occupiers had the right of access to housing as provided in Section 26 (1) of the Constitution and that the State had not taken the appropriate steps to ensure realisation of the right for the people who can be categorised as desperately in need of housing. The Court stated that:

> …the real issue is not the existence of the right; it is whether the state has taken any steps in relation to those who, on all accounts, fall in the category of those in 'desperate need.'[93]

The SCA held that Modderklip had the right to its property as entrenched in Section 25 (1) of the Constitution and was entitled to constitutional damages for the violation of its constitutionally entrenched property rights.[94] The SCA also held that the appropriate relief for the occupiers was to allow them to remain on the land until alternative land or accommodation was made available to them by the State.[95] The SCA balanced the right to property by Modderklip and the rights of the occupiers by ordering that payment of damages in respect of the land occupied by the community and declaring that the residents were entitled to occupy the land until alternative land was made available to them by the State.

The case was appealed to the Constitutional Court. The Court offered guidance that the State should take reasonable steps ensuring that large-scale disruptions in the social fabric do not occur upon execution of court orders, thus undermining the rule of law.[96] The Court termed as unreasonable, the State's failure to take steps to assist Modderklip to vindicate its property to avoid large-scale social disruption caused by the eviction of a large community with nowhere to go.[97] The failure by the State was contrary to the rule of law.

The Court concurred with the SCA on the relief given to the unlawful occupiers and also ordered that the occupiers remain on the land until alternative land is made available by the

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[92] *Modder East Squatters & Another* v *Modderklip Boerdery (Pty) Ltd, President of the Republic of South Africa & Others* (2004) All SA 169 (SCA) Para 45.
[93] Ibid Para 22.
[94] Ibid.
[95] Ibid Para 44.
[96] Ibid.
[97] Ibid Paras 35, 44 & 47.

State.[98] The Court further stated that the State infringed on the rights of Modderklip by declining to provide appropriate mechanisms to give effect to the eviction order issued by the High Court. Consequently, the Court ordered the Department of Agriculture and Land Affairs to pay compensation to Modderklip in respect of the land occupied by the unlawful occupiers.[99]

The *Modderklip* case is significant because it underscores the duties of the State in the context of a private landowner's unsuccessful efforts to execute an eviction order granted in terms of Section 4 of PIE. According to SERI, the case demonstrates that the positive obligation of the State to provide housing to unlawful occupiers is connected to its negative obligation to protect the property rights of the owner.[100] Liebenberg observes that the case demonstrates that active State involvement is imperative in seeking pragmatic and humane solutions to eviction-related conflicts which are consonant with the rights and values protected in the Constitution.[101] Liebenberg further observes that the SCA and the Constitutional Court concurred on the principle that where an eviction causes vulnerability to the affected occupiers, the State should accord access of accommodation to the occupiers pending integration of long-term housing programmes.[102]

Wilson observes that the *Modderklip* case is significant because it buttresses Section 26 of the Constitution which protects the right to housing and protects against forced evictions and states that:

> …*Modderklip* case is authority both for the proposition that evictions which lead to homelessness are a violation of Section 26 (1) of the Constitution and that an unreasonable failure to give effect to the obligation to provide at least basic temporary alternative shelter for unlawful occupiers, resulting in the loss of the owner's use and enjoyment of the land, may give rise to an action for constitutional damages.[103]

The case applied important principles of the rule of law and access to the courts which Kenya can learn from. The case places the aspect of protection from evictions in the lens of the rule of law and access to the courts. The case further demonstrates that the State should not abdicate its responsibilities in a dispute between private parties where constitutional rights are

[98] The *Modderklip* case (note 11 above) Para 68.
[99] Ibid Paras 44 & 68.
[100] SERI (note 5 above) 13.
[101] Liebenberg (note 6 above) 285.
[102] Ibid.
[103] S Wilson 'Curing the Poor: State Housing Policy in Johannesburg after Blue Moonlight' (2012) 5 *Constitutional Court Review* 277-278.

threatened. The case elicited an important principle that the State should accord access of accommodation to vulnerable occupiers of land facing eviction pending integration of long-term housing programmes, which Kenya can learn from.

The Constitutional Court has considered the implications of Section 26 of the Constitution in circumstances where the State intends to evict people living in informal settlements in order to undertake housing projects. In *Residents of Joe Slovo Community in Western Cape v Thubelisha Homes* case,[104] the City of Cape Town made an effort to persuade the residents to move from the publicly owned land of Joe Slovo to Delft which was 15 km away from their present homes in order to enable Thubelisha Homes to proceed with the development of formal housing.[105] The applicants initially accepted the project but later became dissatisfied because of broken promises of subsidised low rental accommodation.[106]

The *Joe Slovo* case addressed three main arguments raised by the applicants. The community in Joe Slovo argued that the City of Cape Town through its conduct of providing basic amenities had impliedly given consent to their occupation.[107] Firstly, the applicants argued that the consent had not been terminated by the City implying that they were not unlawful occupiers and could not be evicted from the Joe Slovo settlement.[108] Secondly, they argued that the eviction from the settlement did not meet the threshold of being just and equitable within the meaning of the PIE.[109] Thirdly, they argued that they had a legitimate expectation that 70% of the houses in the new development were supposed to be allocated to former and current residents of the Joe Slovo settlement.[110]

The Court a majority decision was in consensus that the applicants were unlawful occupiers within the meaning of PIE.[111] The judgments by all the judges concurred that the threshold of just and equitable in terms of PIE was met by the Minister for Housing and the Minister for Housing in the Western Cape, the respondents in the case. In the view of the Court, the respondents had complied with their obligations to act reasonably in seeking to protect the right of access to adequate housing contained in Section 26 of the Constitution in their

[104] 2010 (4) SA 454 (CC).
[105] Ibid Para 30.
[106] Ibid Para 31.
[107] Ibid Para 156.
[108] Ibid Paras 31 & 173; K Mclean 'Meaningful Engagement: One Step Forward or Two Back? Some Thoughts on Joe Slovo' (2010) 3 *Constitutional Court Review* 225-228.
[109] Ibid Para 91.
[110] Ibid Para 4 (g).
[111] Ibid Para 4.

resolve to evict the applicants.[112] The Court stated that no person may be moved unless alternative accommodation and meaningful engagement with households prior to evictions.[113]

The *Joe Slovo* case is imperative in addressing the issue of legitimately relocating large communities living in informal settlements in order to allow for the development of formal housing.[114] Mclean hailed the *Joe Slovo* case as one that demonstrates procedural fairness in an assessment of whether evictions envisaged by the Court were just and equitable.[115] The case explains the State's positive obligation to provide housing, progressively and within its available resources and whether it is just and equitable under various circumstances to carry out an eviction.

The Court laid down the requirements for evictions of people from informal settlements to facilitate development of housing projects in *Occupiers of 51 Olivia Road, Berea Township and 197 Main Street Johannesburg v City of Johannesburg and Others.*[116] The case concerned eviction of 400 occupiers of Johannesburg from buildings that were unsafe and unhealthy. The City of Johannesburg had initially applied to the Johannesburg High Court for the eviction of occupiers of six buildings because the City termed the buildings as unsafe and unhealthy for habitation by the occupiers.[117] The buildings were home to the desperate occupiers. The City was implementing a regeneration strategy adopted in 2003 which it claimed informed of its decision to evict the occupiers.[118] The strategy involved identification of bad and unsafe buildings with the intention of closing them down.

The High Court declared that the housing programme of the City failed to comply with the constitutional and statutory obligations since the City had failed to provide suitable relief for people in the inner city of Johannesburg who lived in a crisis and desperately required accommodation.[119] The High Court declined to evict the occupiers, but instead ordered the City to remedy its housing programme which the Court found to be inadequate.[120] The High Court directed the City to devise and implement within its available resources a

[112] Ibid Paras 49-50.
[113] Ibid Para 18.
[114] Ibid Paras 18 & 43; Currie & De Waal (note 29 above) 585.
[115] Mclean (note 108 above) 242.
[116] 2008 (3) SA 208 (CC).
[117] Ibid Para 1. The notices were issued pursuant to notices issued in terms of section 12(4) (b) of the National Building Regulations and Building Standards Act 103 of 1977.
[118] Ibid Para 19. The City was implementing the Johannesburg Inner City Regeneration Strategy 2003.
[119] Ibid Paras 2 & 5.
[120] Ibid Para 2.

comprehensive programme to progressively realise the right to adequate housing to people in the inner city who desperately needed accommodation.[121] The High Court ordered the City to provide alternative accommodation to the occupiers, pending the implementation of the programme and further ordered the City not to evict the occupiers from the buildings.[122]

The City and the occupiers were dissatisfied with the judgement of the High Court and appealed to the Supreme Court of Appeal (SCA).[123] The SCA observed that the powers of the City to order the vacating of unsafe buildings, was not dependent on its ability to offer alternative housing to the occupiers.[124] The SCA observed that the City had a constitutional obligation of providing at least minimum shelter to the occupiers who have no access to alternative housing. The alternative accommodation envisaged by the SCA need not necessarily be located within the inner city as demanded by the occupiers.[125]

The SCA upheld the appeal by the City and granted eviction on condition that the City would provide alternative accommodation to occupiers who would be rendered homeless.[126] The SCA directed the occupiers not to occupy the property concerned until such time as the City grants written permission for occupation and use. The SCA further ordered the City to relocate the occupiers to a temporary settlement area within its municipal area. The SCA stated that the temporary accommodation should be a place where the occupiers would be secure against eviction, the structures should be waterproof and secure against the elements and provide basic sanitation, water and refuse services.[127]

The occupiers of two buildings in the inner city of Johannesburg appealed to the Constitutional Court challenging the correctness of the judgement by the SCA in granting an order for their eviction upon the finding that the buildings they occupied were unsafe and unhealthy.[128] The occupiers contended that the administrative decision to evict them was not reasonable because in particular the City did not take into account that the occupiers would be homeless after the eviction.[129] They also contended that Section 26 (3) of the Constitution

[121] Ibid.
[122] Ibid.
[123] *City of Johannesburg v Rand Properties (Pty) Ltd and Others* 2007 6 BCLR 643 (SCA).
[124] Ibid Para 5.
[125] Ibid.
[126] Ibid Para 78.
[127] Ibid.
[128] *Occupiers of 51 Olivia Road* case (note 116 above) Para 1.
[129] Ibid Para 7.

precluded their eviction and the standards set out in PIE had not been applied because the City had applied the National Building Regulations and Building Standards Act.[130]

The Court observed that the City did not take into account that eviction of the residents would lead to homelessness and regretted that the municipal officers did not exercise accountability for their actions.[131] The Court indicted the City by stating that it had a duty to ensure safe and healthy buildings on the one hand and to take reasonable measures within its available resources to realise the right of access to adequate housing.[132]

The Court noted that the City had not made an effort to engage with the occupiers of the building before the intended eviction which would have led to homelessness.[133] The Court ruled that the municipality ought to have engaged meaningfully with the occupiers both individually and collectively before eviction.[134] The concept of meaningful engagement will be discussed subsequently in this chapter.

6.3.2 Extension of Security of Tenure (ESTA)

ESTA offers protection to farm dwellers and those living on rural land who lived on someone else's land to secure legal right to the land.[135] ESTA governs the eviction of lawful occupiers or occupiers of rural or peri-urban land whose occupation was previously lawful and sets out the circumstances and procedures under which evictions may take place. Similar to PIE, ESTA requires a landowner to get a Court order before evicting unlawful occupiers. ESTA applies to all land other than land in a township and provides that:

> …the Act applies to all land other than land in a township established, approved, proclaimed or otherwise recognised as such in terms of any law, or encircled by such a township or townships, but including any land within such a township which has been designated for agricultural purposes in terms of any law; and any land within such a township which has been established, approved, proclaimed or otherwise recognised after 4 February 1997, in respect only of a person who was an occupier immediately prior to such establishment, approval, proclamation or recognition.[136]

ESTA defines an occupier as a person residing on land which belongs to another person and one who has consent or lawful authority to reside on that land.[137] It excludes labour tenants

[130] Ibid Paras 7 & 18.
[131] Ibid Para 44.
[132] Ibid.
[133] Ibid Para 44.
[134] Ibid Para 13.
[135] ESTA (note 15 above) Section 3.
[136] Ibid Section 2(1).
[137] Ibid Section 1 (x).

and a person using or intending to use the land mainly for industrial, mining, commercial or commercial farming purposes.[138]

ESTA further states that occupiers may be granted consent by the owner of land or the person in charge of the land in question.[139] In relation to termination of the right to residence or eviction by a holder of mineral rights, consent would include the express consent of the owner of the land or the person in charge of the land.[140] ESTA defines suitable alternative accommodation for occupiers to mean accommodation that is safe and not less favourable than the previous situation, having regard for the residential accommodation and land for agricultural use available to them prior to eviction.[141]

ESTA protects occupiers who have lived on land belonging to the owner for ten years and have either reached the age of 60 years and are employees or former employees of the owners or persons in charge. The occupation of such occupiers may not be terminated unless the occupiers have committed such a fundamental breach of the relationship between them and the owners or persons in charge that it is not practically possible to restore the relationships.[142] The occupation may be terminated on the basis of breach of any agreement pertaining to the rights of occupiers to reside on the land and has fulfilled their duties in terms of the law, while the occupiers have breached material and fair terms of the agreement.[143]

Chenwi observes that ESTA cured the apartheid discriminatory laws and practices which rendered South Africans vulnerable to evictions by leaving many of them with no secure tenure of their homes and the land which they use.[144] The laws and policies during the apartheid era had contributed to a fragmented and racially based human settlement environment which was a major cause of arbitrary evictions and relocation of people to racially defined areas.[145]

Even though the application of ESTA is limited compared to PIE, it is significant in protection against evictions since its provisions can inform reforms in the legislative

[138] Ibid.
[139] Ibid.
[140] Ibid.
[141] Ibid.
[142] Ibid Sections 4 & 10.
[143] Ibid Section 4(b).
[144] L Chenwi 'Implementation of Housing Rights in South Africa: Approaches and Strategies' (2015) 24 *Journal of Law and Social Policy* 72
[145] Ibid; SAHRC *Report of the High Level Panel on the Assessment of Key Legislation and the Acceleration of Fundamental Change* (2017) 512, 532 & 556.

framework on evictions in Kenya on three aspects. Firstly, ESTA recognises that many people are vulnerable to unfair evictions because they do not have secure tenure of their homes and the land that they occupy.[146] Secondly, similar to PIE, ESTA requires courts to consider whether it is just and equitable to grant an eviction order, having regard for all relevant circumstances. Thirdly, ESTA affords protection to occupiers that cannot be terminated unless they have committed a serious breach of their duties.[147]

The following part evaluates protection of land rights and protection from evictions of traditional communities with informal land rights in South Africa.

6.4 Protection of Informal Land Rights In South Africa

6.4.1 Interim Protection of Informal Land Rights Act (IPILRA)

The IPILRA[148] protects informal land rights of communities in terms of customary law. IPILRA was enacted to give effect to Section 25 (6) of the Constitution,[149] pending final legislation with the aim of protecting land rights of people living in former homeland territories.[150] IPILRA was supposed to lapse in 1997 and has been continually extended annually in terms of Section 5 (2) and remains the only piece of legislation that protects informal land rights.[151]

IPILRA aims at providing for temporary protection of certain rights to and interests in land which are not otherwise adequately protected by law and to provide for matters connected thereto.[152] It defines a community as a group of persons whose rights to land are derived from shared rules determining access to land held in common by such a group.[153] It defines informal right to land as the use of, occupation of, or access to land in terms of any tribal,

[146] Liebenberg S *Human Development and Human Rights South African Country Study Human Development Report 2000 Background Paper* (2000) < https://hdr.undp.org/system/files/documents/sandraliebenbergpdf.pdf> accessed 10 August 2022 [4].
[147] Ibid; ESTA (note 15 above) Section 4.
[148] IPILRA (note 16 above).
[149] Section 25(2) provides that 'property may be expropriated only in terms of law of general application for a public purpose or in the public interest and subject to compensation.'
[150] Section 25(6) provides that 'a person or community whose tenure of land is legally insecure as a result of past racially discriminatory laws or practices is entitled, to the extent provided by an Act of parliament, either to tenure which is legally secure or to comparable redress.'
[151] Y Meyer '*Baleni v Minister of Mineral Resources* 2019 2 SA 453 (GP): Paving the Way for Formal Protection of Informal Land Rights' (2020) 23 *Potchefstroom Electronic Law Journal* 9.
[152] IPILRA (note 16 above) the Preamble.
[153] Ibid Section 1 (ii).

customary or indigenous law or practice of a tribe.[154] Informal right to land also include the custom, usage or administrative practice in a particular area or community.[155]

IPILRA provides that no person may be deprived of any informal right to land without his or her consent. However, where land is held on a communal basis, a person may be deprived of such land or right to land in accordance with the custom and usage of that community.[156] IPILRA provides that in the event of deprivation of a right to land caused by a disposal of the land or a right to land by the community, the community is obligated to compensate appropriately any person who is deprived of an informal right to land as a result of such disposal.[157]

IPILRA provides for the principle that a decision to dispose of the right to land may only be taken by a majority of the holders of such right through a meeting convened after giving sufficient notice to members of the community who have a reasonable opportunity to participate.[158] The decision for disposal is made by the members present or represented at the meeting. IPILRA is a significant legislation in the protection against evictions.

The following section discusses case law in South Africa that has interpreted IPILRA to protect communities who lack a formal title to land.

6.4.1.1 *Baleni v Minister of Mineral Resources* Case

The High Court has developed jurisprudence on the rights of people who hold informal land tenure. In *Baleni v Minister of Mineral Resources,*[159] the High Court recognised the fundamental link between the dignity of indigenous peoples and their land. The case concerned a dispute between the rural community of Umgungundlovu living in the Eastern Cape, and an Australian mining company, Transworld Energy and Mineral Resources (TEM Company).[160] TEM applied for a mining right for titanium ores and other heavy minerals in the Xolobeni area, Eastern Cape where the community lived.[161]

[154] Ibid Section 1 (iii).
[155] Ibid.
[156] Ibid Section 2 (ii).
[157] Ibid Section 2 (iii).
[158] Ibid Section 2 (iv).
[159] 2019 2 SA 453 (GP).
[160] Ibid Para 4.
[161] Ibid.

The Umgungundlovu community had lived on the land and enjoyed a rich cultural life within the greater Amadiba traditional community. The community had a long history of occupying, owning and using its land under its customary law.[162] The community utilised land for grazing livestock and cultivation of crops. According to the customary law of the Umgungundlovu community, land is accrued to persons by virtue of being members of the community.[163]

In the High Court, TEM Company claimed the right to mine on land belonging to the community. The community opposed the proposed mining by TEM Company on the basis that it had disastrous social, economic and ecological consequences.[164] The community further opposed the influx of outsiders coming to live in their community because in the opinion of the community, the outsiders would introduce social ills that are often associated with mining activities. The community opposed the mining activities because it would physically displace them from their homes and completely destroy their cultural way of life.[165]

The High Court determined whether consent by the community was necessary for mining on land that was held by the community under customary law. The High Court held that consent is a necessary tool that ensures that communities living under informal tenure which could be described as legally insecure as a result of past racially discriminatory laws or practices, are entitled either to tenure which is legally secure or to comparable redress.[166] The High Court in interpreting Section 2 (1) of IPILRA emphasised that FPIC from the community was necessary. The Court stated the following:

> …granting special protection to these communities by requiring consent as opposed to mere consultation is in accordance with international law. Multiple international instruments require that communities such as the applicants have the right to grant or refuse their FPIC to any mining development that will significantly affect them.[167]

The High Court was emphatic in protection of indigenous peoples' rights. The High Court did not deny mining rights to TEM Company but stated the essence of free, prior and

[162] Ibid Paras 9 & 10.
[163] Ibid Para 10.
[164] Ibid Para 14.
[165] Ibid Para 18.
[166] Ibid Para 43. The High Court relied on the Constitutional Court decision in *Maledu v Itereleng Bakgatla Mineral Resources (Pty) Limited* 2019 2 SA 1 (CC). The Court vindicated the rights of the applicants by stating in Para 5 that 'communities whose tenure of land is legally insecure as a result of past racially discriminatory laws or practices are entitled either to tenure which is legally secure or to comparable redress.'
[167] Ibid Para 78.

informed consent (FPIC) as a requirement for protection of communities in instances where there is informal tenure. The High Court observed that obtaining FPIC was in conformity with international best practices on protection of indigenous peoples' land rights. The High Court declared that the Minister of Mineral Resources did not have lawful authority to grant mining rights to TEM Company and ordered the Minister to obtain the full and informed consent of the community as the holders of rights to the land, prior to granting any mining right.[168] In doing so, the High Court established a higher standard for obtaining a mining right over such property.

The High Court struck a balance between IPILRA and the Mineral and Petroleum Resources Development Act (MPRDA).[169] The High Court noted that whereas MPRDA was enacted to foster equitable access to mineral resources, IPILRA was enacted to protect communities that did not have formal rights to land.[170] Regarding the question whether consent is required for obtaining a mining right over land held under customary law in terms of IPILRA, the High Court had to determine the adequacy of such consent or whether mere consultation under the MPRDA is sufficient.[171] The High Court observed that MPRDA required consultation before granting a mineral right and not consent as provided for under IPILRA.[172]

MPRDA requires an application for a mineral right to be made to the Regional Manager.[173] The Regional Manager is obligated to inform the parties to conduct an environmental impact assessment and consult with the interested and affected parties within 180 days from the date of the notice.[174] MPRDA also requires the applicant to inform the land owner in writing that the application for mining rights has been accepted for consideration by the Regional Manager concerned. The applicant must fully disclose details of what the prospecting operation would entail, sufficient to inform on the impact that the mining activities will have on the land, to the land owner.[175] Additionally the applicant is obligated to consult with the land owner in order to yield satisfaction of both parties that the proposed mining activities

[168] Ibid Para 84 (2).
[169] Act 28 of 2002.
[170] The *Baleni* case (note 159 above) Para 64.
[171] Ibid Para 43.
[172] Ibid Para 47.
[173] The MPRDA (note 169 above) Section 22.
[174] Ibid Section 16 (4) b.
[175] Ibid Section 5A (c).

will not have adverse effects and submit the result of the consultation process to the Regional Manager within 30 days of receiving the notification to consult.[176]

The High Court explained that in terms of MPRDA, even though the State is the custodian of mineral and petroleum resources and may award mining rights to an applicant after consultation with the land owner, the MPRDA must be read together with the IPILRA. In explaining that the application of the MPRDA would not isolate application of the IPILRA, the High Court stated that:

> ...the MPRDA and IPILRA must be read together. In keeping with the purpose of IPILRA to protect the informal rights of customary communities that were previously not protected by the law, the applicants in this matter therefore have the right to decide what happens with their land. As such they may not be deprived by their land without their consent. Where the land is held on a communal basis as in this matter the community must be placed in a position to consider the proposed deprivation and be allowed to take a communal decision in terms of their custom and community on whether they consent or not to a proposal to dispose of their rights to their land.[177]

The High Court declared that the Minister of Mineral Resources, the first respondent lacked any lawful authority to grant a mining right to TEM in terms of MPRDA because the respondents had not complied with the IPILRA.[178] The High Court further declared that in terms of the IPILRA, the first respondent was obligated to obtain FPIC of the community as holder of rights to the land, prior to granting any mining right to TEM in terms of MPRDA.[179]

Meyer observes that the *Baleni* case creates jurisprudence that protects indigenous peoples as informal land owners against the potentially harmful effects of commercial mining activities.[180] Meyer also observes that despite the Court making the judgement in favour of the community, there is need for long-term solutions to informal land tenure and land security in general.[181] Meyer argues that legislation should be enacted to provide protection for people who hold informal land rights which would facilitate formalisation of indigenous communities' land rights.[182]

The *Baleni* case is significant because it creates critical jurisprudence that protects informal land owners by establishing a higher standard for obtaining a mining right over land

[176] Ibid Section 10 (1) b
[177] The *Baleni* case (note 159 above) Para 79.
[178] Ibid Para 84(1).
[179] Ibid Para 84(2).
[180] Meyer (note 151 above) 1 & 2.
[181] Ibid 1.
[182] Ibid.

belonging to communities and protection from potentially harmful effects of mining activities by non-state actors such as multinational corporations.[183] The case addressed the issue of informal land tenure for the rural community of Umgungundlovu which held an informal title to the land. The case elicited useful principles such as FPIC and consultations with communities which are arguably substantive safeguards which represent significant development in eviction jurisprudence. Kenya can learn useful lessons from this case in respect to protection of indigenous peoples and other communities in Kenya who do not enjoy formal land tenure since informal land tenure is the major cause of forced eviction in Kenya.

6.4.1.2 *Richtersveld Community & Others V Alexkor Limited & Another* Case

The case of *Richtersveld Community & Others v Alexkor Limited & Another*[184] also demonstrates protection of traditional communities by the courts. The Richtersveld community inhabited a vast territory of some half a million hectares in the Northern Cape Province with a total population of only about 3 500 people.[185] The government seized the land from the community and granted it to Alexor Limited, a diamond mining company whose only shareholder was the South African State.[186]

The case, first filed at the Land Claims Court (LCC) concerned a claim for restitution of land by the community under the Restitution of Land Rights Act (the RLRA).[187] The community claimed that it was dispossessed of ownership, exclusive beneficial occupation and use of the subject land including the exploitation of the natural resources.[188] The community claimed that apart from occupation of the land, it was entitled to conduct cultural and religious practices on the land as well as having rights to graze, cultivate, hunt, harvest and exploit natural resources on the land.[189] The community had a pastoralist lifestyle that was necessitated by the arid semi-desert environment and had social and political structures governed by customary law.[190]

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[183] Ibid.
[184] *Richtersveld Community and Others v Alexkor Ltd and Another* (2001) (3) SA 1293 (LCC).
[185] Ibid Para 2.
[186] Ibid.
[187] Act 22 of 1994.
[188] *Richtersveld Community* case (note 184 above) Paras 1-5.
[189] Ibid Para 10.
[190] Ibid Paras 19 & 20.

The LCC confined itself to deciding on the question whether the community met the requirements of Section 2 (1) of RLRA regarding whether the dispossession was 'as a result of the past racially discriminatory laws or practices.' The LCC established that the Richtersveld constituted a community for the purposes of RLRA, and had occupied the subject land for a continuous period of not less than ten years prior to its dispossession.[191] However the LCC dismissed the claim by stating that the community had failed to prove that this dispossession was the result of discriminatory laws or practices.[192]

The Supreme Court of Appeal (SCA) found that the community had been in exclusive possession of the land before and after its annexation by the British Crown in 1847.[193] The evidence in the SCA showed that at the time of annexation of the land, the community had enjoyed undisturbed and exclusive occupation of the subject land as common property passing from one generation to another and governed by customary law.[194] Further evidence showed that the State treated the land as its own, exploited it and transferred it to Alexor Limited.[195] The State had refused to recognise that the land was not *terra nullius* and that the community had any rights on the land.

In vindicating the rights of the community, the SCA stated that the community held the rights to the land and the minerals under customary law and the customary law land rights were akin to those rights held under common law. The SCA, in setting aside the decision of the LCC stated that:

> …the community is entitled in terms of Section 2 (1) of the Restitution of Land Rights Act 22 of 1994**,** to restitution of the right to exclusive beneficial occupation and use, akin to that held under common law ownership, of the subject land including its minerals and precious stones.[196]

The SCA also observed that the community was dispossessed of its rights in the land because of the past racially discriminatory laws or practices. In making the observation, the SCA noted that the State policy since 1920 has consistently regarded the land inhabited by the

[191] Ibid Para 5.
[192] Ibid Paras 46 & 76.
[193] *Richtersveld Community and Others v Alexkor Limited and Another* (488/2001) [2003] ZASCA 14; [2003] 2 All SA 27 (SCA) Paras 30-45.
[194] Ibid Paras 28-33.
[195] Ibid Para 102.
[196] Ibid Para 111.

community as Crown land and refused to recognise that the community had any rights on the land.[197]

The Constitutional Court affirmed the decision by the SCA by ruling in favour of the community. The Court considered among other issues, the nature of the community's rights of land prior to and after annexation of its land, the steps that the State had taken in respect of the land after 19 June 1913 and whether the dispossession was facilitated by racially discriminatory laws or practices.[198] The Court held that the nature and content of the community's land rights prior to annexation had to be determined by indigenous law and affirmed that the indigenous law governed its land rights.[199]

The Court stated that the land rights of the community could not be governed through common law and as such, any dispute between indigenous peoples' rights to occupy land had to be determined without importing and considering the English conceptions of property law.[200] The Court elaborated on the nature of the title held by the community and stated that:

> … the real character of the title that the community possessed in the land, was a right of communal ownership under indigenous law. The content of that right included the right to exclusive occupation and use of the subject land by members of the community. The community had the right to use its water, to use its land for grazing and hunting and to exploit its natural resources, above and beneath the surface. It follows that prior to annexation, the community had a right of ownership in the land under indigenous law.[201]

The Court observed that the community was dispossessed of its land by virtue of racially discriminatory laws and practices.[202] The Court observed that the Precious Stones Act[203] in particular facilitated deprivation of the community's indigenous law rights to land while significantly recognising the rights of registered owners.[204] The Court declared that the community was entitled to occupation and exclusive beneficial use of the land including the minerals and precious stones in terms of Section 2 of the RLRA to restitution.[205]

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[197] Ibid Para 107.
[198] *Alexkor Limited and Another v Richtersveld Community and Others* (2003) (12) BCLR 1301 (CC) Para 18.
[199] Ibid Para 50.
[200] Ibid.
[201] Ibid Para 62.
[202] Ibid Para 96.
[203] Act 44 of 1927.
[204] The *Alexkor Limited* case (note 198 above) Para 99.
[205] Ibid Para 103.

Barume observes that the case would have a major impact on the protection of indigenous peoples from eviction from their land.[206] Barume posits that the Constitutional Court did not distinguish land rights and mineral rights but ruled that communal ownership of land included communal ownership of minerals and precious stones.[207] The Court's decision in this case made an impact in protection of indigenous peoples' land rights.

SAHRC observes that the consequence of the lack of legislative protection for the land tenure of rural people has facilitated individuals and corporations to strategically take advantage of rural peoples' vulnerabilities.[208] The individuals and corporations include transnational mining companies, foreign investors, and commercial farmers who take advantage in absence of legislation and State regulations that are supposed to address the structural inequalities and vulnerabilities created by colonialism and apartheid.[209]

The case draws important lessons for Kenya with regard to the legal protection of indigenous peoples' land rights and protection from arbitrary evictions. The Constitutional Court in particular upheld the informal title held by the community under indigenous law over written laws. The arguments made by the Court can be instrumental in buttressing protection of Kenya's indigenous peoples and communities from arbitrary evictions from their land.

The jurisprudence that has developed around the issue of the Richtersveld confirms that communal ownership of land included communal ownership of minerals and precious stones, an important principle that is relevant in protection of traditional communities from arbitrary evictions. The jurisprudence buttresses restitution of the rights to minerals in terms of the RLRA. Such jurisprudence can inform Kenya's protection of indigenous peoples and communities' rights to land.

6.5 The Process for Lawful Evictions in South Africa

6.5.1 Meaningful Engagement

The courts in South Africa have been instrumental in the development of SERs jurisprudence with special focus on forced evictions and the right to housing. PIE provides that a municipality may initiate mediation by appointing one or more persons with expertise in

[206] AK Barume *Land Rights of Indigenous Peoples in Africa with Special Focus on Central, Eastern and Southern Africa* (2014) 181.
[207] Ibid; the *Richtersveld Community* case (note 193 above) Para 111.
[208] SAHRC (note 145 above) 266.
[209] Ibid.

dispute resolution to facilitate meetings of interested parties and to attempt to mediate and settle any dispute.[210] PIE provides two instances where the municipality may initiate mediation. Firstly, if the municipality whose area of jurisdiction the land in question is situated is not the owner of the land, it may initiate mediation on conditions that the parties may determine from time to time.[211]

Secondly, in the event that the municipality is the owner of the land in question, the member of the Executive Council designated by the Premier of the Province concerned or a nominee may initiate mediation and settle any dispute in terms of PIE.[212] Provided that the parties may at any time, by agreement, appoint another person to facilitate meetings or mediate a dispute, on the conditions that the said member of the Executive Council may determine.

The courts have developed the concept of meaningful engagement as an important component in protection against arbitrary evictions. Meaningful engagement entails that before undertaking an eviction, there must be a process of alternative dispute resolution (ADR). The ADR process includes discussion on whether the owner's interests can be met in any other way rather than through eviction and the availability of alternative accommodation, which can be a reprieve to the illegal occupiers.[213]

In explaining the importance of ADR in evictions, the Constitutional Court in the *Port Elizabeth Municipality* case indicated that mediation is an important tool that can help achieve mutually acceptable solutions between illegal occupiers and land owners.[214] The Court explained the importance of mediation as an important mechanism in eviction proceedings. The Court justified the use of mediation in eviction proceedings as an increasingly common feature in modern systems and an innovative way of achieving sustainable reconciliations of the different interests that yields mutually acceptable solutions.[215]

The Court observed that it has to be more innovative in a dignified and effective mode of achieving sustainable reconciliations of the different interests and encourage the parties to

[210] PIE (note 14 above) Section 7(1).
[211] Ibid Section 7(2).
[212] Ibid.
[213] I Ndegwa 'A Roof over Wanjiku's Head: Judicial Enforcement of the Right to Housing under the Constitution of Kenya' in *Judicial Enforcement of Social-economic Rights under the New Constitution: Challenges and Opportunities for Kenya* (2011) 162-163; Liebenberg (note 6 above) 418-419.
[214] The *Port Elizabeth Municipality* case (note 74 above) Para 39.
[215] Ibid.

engage with each other in order to yield mutually acceptable solutions.[216] The Court explained the essence and usefulness of mediation in the following manner:

> …not only can mediation reduce the expenses of litigation, it can help avoid the exacerbation of tensions that forensic combat produces. By bringing the parties together, narrowing the areas of dispute between them and facilitating mutual give-and take, mediators can find ways round sticking-points in a manner that the adversarial judicial process might not be able to do. Money that otherwise might be spent on unpleasant and polarising litigation can be better used to facilitate an outcome that ends a stand-off, promotes respect for human dignity and underlines the fact that we all live in a shared society.[217]

The concept of meaningful engagement was developed by the Constitutional Court in *the Occupiers of 51 Olivia Road* case.[218] The Court affirmed the obligation on local authorities in all evictions, to seek reasonable ways to avoid homelessness by engaging meaningfully with the affected communities.[219] The Court underscored the obligation to provide suitable alternative accommodation when dealing with people who will find themselves desperate or in crisis situations if accommodation is not provided upon eviction.

The Court noted that the City of Johannesburg had not made an effort to engage with the occupiers of the building before the intended eviction which would have led to homelessness.[220] The Court stated that the municipality ought to have engaged meaningfully with the occupiers both individually and collectively.[221] In laying emphasis on the essence of meaningful engagement upon hearing the application, the Court issued interim orders by stating that:

> …the City of Johannesburg and the applicants are required to engage with each other meaningfully and as soon as it is possible for them to do so, in an effort to resolve the differences and difficulties aired in this application in the light of the values of the Constitution, the constitutional and statutory duties of the municipality and the rights and duties of the citizens concerned.[222]

The Court, in making the interim order obligated the State to meaningfully engage with illegal occupiers before eviction. The Court ordered the parties to report back on the process while proceedings were pending and emphasised that the process of engagement should take place before litigation commences.[223] Mclean observes that the Court in the *Occupiers of 51*

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[216] Ibid.
[217] Ibid Para 42.
[218] The *Occupiers of 51 Olivia Road* case (note 116 above).
[219] Ibid Paras 5,
[220] Ibid Para 44.
[221] Ibid Para 13.
[222] Ibid Para 5.
[223] Ibid Para 30.

Olivia Road case failed to engage the 'hard issues' but instead referred the matter to the parties to attempt to address the issues themselves.[224]

The Court explained that meaningful engagement is a two way process where the affected persons and the City would talk to each other meaningfully to achieve certain objectives. The objectives include the consequences of the eviction, whether the City would alleviate the dire consequences of the eviction, whether the buildings could be made safe for habitation during the interim period, whether the City had any obligations to the occupiers in the prevailing circumstances and how the City would fulfil those obligations.[225] The Court subsequently handed down judgement after the parties had reached a settlement and submitted it for consideration.

The Court gave guidance that meaningful engagement contributes towards resolution of disputes and increased understanding among the concerned parties.[226] The Court further encouraged the affected people to be proactive in their demands for the right to housing and not necessarily be defensive.[227] Most importantly, the Court stated that where many people are potentially affected by eviction, there is need for structured and consistent engagement.[228] In the Court's analysis, meaningful engagement encompasses the need for public authorities to have an obligation derived from constitutional and legislative provisions to protect people from homelessness and suffering caused by forced evictions.

Chenwi observes that the Court took responsibility to develop meaningful engagement as an innovative remedy before handing down its judgement as is ordinarily the case.[229] Chenwi also observes that the Court contributed to the development of an effective remedy for SERs violations by issuing an interim order requiring the parties to engage with each other meaningfully and report back to the Court.[230] The Court expanded the participatory dimension of resolving disputes and facilitated a participatory solution to the conflicting interest between the City's concern to avoid habitation of buildings which pose a danger to

[224] Mclean (note 108 above) 241-242.
[225] The *Occupiers of 51 Olivia Road* case (note 116 above) Para 14.
[226] Ibid Para 15.
[227] Ibid Para 20.
[228] Ibid Para 19.
[229] L Chenwi 'A New Approach to Remedies in Socio-Economic Rights Adjudication: *Occupiers of 51 Olivia Road v City of Johannesburg and Others*' (2009) 2 *Constitutional Court Review* 371-372.
[230] Ibid.

health and safety, and the residents' interest of having access to adequate alternative accommodation in proximity to the places where they pursued their livelihoods.[231]

The case elicited an important principle that would help Kenya address the problem of arbitrary evictions. The Court affirmed the basic principle of meaningful engagement in good faith between public authorities and occupiers in situations where people face homelessness due to an eviction with a view to addressing the problem in a humane and pragmatic manner.[232] The objectives of such engagement would be to ascertain what the consequences of an eviction might be, and the ability of the City to render the buildings relatively safe. Engagement would also help ascertain whether the City had any obligations to the occupiers under such circumstances and how it would fulfil its obligations.

The Constitutional Court in the *Joe Slovo* case[233] also applied the remedy of meaningful engagement. The five judgments delivered by the Court concurred on the need for engagement between the City of Cape Town and the residents and prescribed a structural eviction process that ensures relocation of the residents. The Court ordered the parties to engage meaningfully with each other with a view to reach agreement on the date upon which the relocation would commence and any other relevant matter upon which they would agree to engage.[234]

The Court directed the City to engage with the affected people, in respect of the relocation that was scheduled to take place and the engagement to ascertain the names, details and relevant personal circumstances of those who are to be affected by each of the relocation.[235] The Court guided that the engagement should include the exact time, manner and conditions under which the relocation of each affected household would be conducted. The Court further guided that the City bore the obligation to provide temporary residential accommodation units to the relocated residents and provide transport facilities.[236]

The unanimous decision in the *Joe Slovo* case is essential in demonstrating that evictions would only be constitutional if meaningful engagement between the City and residents was

[231] S Liebenberg 'Engaging the Paradoxes of the Universal and Particular in Human Rights Adjudication: The Possibilities and Pitfalls of 'Meaningful Engagement' (2012) 12 *African Human Rights Law Journal* 14-16.
[232] K Mclean *Constitutional Deference, Courts and Socio-Economic Rights in South Africa* (2009) 147-149.
[233] The *Residents of Joe Slovo* case (note 104 above).
[234] Ibid Para 11.
[235] Ibid.
[236] Ibid.

made a component in the process. The Court's order for meaningful engagement suggests that oversight by the courts can transform the engagement process into an effective enforcement mechanism.[237] Ray made this observation and states that:

> …the principal advantage to a more robust engagement process that incorporates judicial control is that it creates a procedure for placing direct pressure on the political branches to develop policies sensitive to constitutional obligations and thus preserve litigation as a tool for citizens and civil society to press for increased attention to SERs.[238]

Liebenberg observes that meaningful engagement requires good faith and reasonableness when parties engage with each other.[239] Liebenberg further observes that the outcomes for such engagements should be consistent with constitutional rights and values. That is the only way that meaningful engagement would yield a significant mechanism in the adjudication of SERs claims.[240] Meaningful engagement goes beyond processes and procedures and should be consistent with the rights and obligations of the parties involved. Liebenberg states that meaningful engagement should not only facilitate participatory democracy but should also constitute a mechanism for realisation and protection of rights and not merely be a vehicle for pressuring the marginalised people to negotiate away their rights.[241]

Kenyan courts and other adjudicative fora can adopt meaningful engagement and mediation as critical mechanisms during eviction proceedings. Parliament can also legislate it as a requirement especially in circumstances where vulnerable communities may be evicted into homelessness. Meaningful engagement as a procedural and substantive requirement would be instrumental in addressing the unequal power relations between people living in informal settlements and rural communities, land owners and the State in finding mediated solutions to mitigate arbitrary evictions in Kenya.

6.5.2 The Role of Municipalities in Evictions

6.5.2.1 Joinder

South Africa has adopted joinder of local authorities and other State organs during eviction proceedings in consideration of what is just and equitable between landowners and unlawful

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[237] B Ray '*Residents of Joe Slovo Community v Thubelisha Homes and Others*: The Two Faces of Engagement' (2010) 10 (2) *Human Rights Law Review* 368.
[238] Ibid.
[239] Liebenberg (note 231 above) 97.
[240] Ibid 302.
[241] Ibid 314.

occupiers of land.[242] In the event of evictions leading to homelessness, joinder of municipalities in the eviction application becomes a requirement where private parties seek to evict communities from private land.[243] The courts have adopted joinder as a tool that ensures that municipalities provide information before courts on the availability of adequate alternative accommodation and as a means to facilitate mediation of the dispute between the parties.[244]

Muller and Liebenberg state that joinder of municipalities in eviction proceedings is essential since it enables the court to move beyond any stalemate created by competing interests through consideration of the constitutional and statutory obligations of the government and to find case-specific solutions.[245] They further state that municipalities are privy to significant information that facilitates courts in the exercise of their discretion in eviction cases in terms of PIE and Section 26 of the Constitution.[246]

Municipalities have a role to play in evictions according to PIE. Section 2 provides for joinder of municipalities and makes it mandatory for joinder of municipalities in eviction proceedings. It provides that:

> …before the hearing of the eviction proceedings for unlawful occupiers, the court must give written and effective notice of the intention of the owner or person in charge to obtain an order for eviction of the unlawful occupier to the unlawful occupier and the municipality in whose area of jurisdiction the land is situated.

According to SERI, the courts are empowered to compel joinder of municipalities in order to provide information on the ability to provide alternative accommodation to the occupiers.[247] Courts also enjoin municipalities as an important component in avoiding homelessness of occupiers due to evictions. The SCA in *The City of Johannesburg v Changing Tides (PTY) Limited & 2 others*[248] addressed the essence of joinder of municipalities in eviction proceedings.

[242] Van Wyk (note 12 above) 60-62.
[243] Ibid.
[244] G Muller & S Liebenberg 'Developing the Law of Joinder in the Context of Evictions of People from Their Homes' (2013) 29 *South African Journal of Human Rights* 569-570.
[245] Ibid.
[246] Ibid 568.
[247] Ibid. See also SERI (note 5 above) 36-38.
[248] (2012) ZASCA 116 (14 September 2012).

The case concerned eviction of residents who were residing in unsafe conditions in an abandoned commercial building called Tikwelo House in the inner city of Johannesburg.[249] Whilst the building was still a factory or warehouse and under different ownership, people started living there in circumstances that Changing Tides (PTY) Limited (Changing Tides) was not able to explain in Court.[250] During the ownership of the previous owners, third parties had taken control of the building, rented rooms and collected rent from the occupiers of the building.[251] The place was unsuitable for habitation due to its state of disrepair and inadequate basic amenities such as water and sanitation. Changing Tides had applied for eviction of the occupiers which the occupiers did not oppose since they accepted the fact that continued habitation was a death trap.[252]

The City of Johannesburg (the City) commenced proceedings against the Changing Tides notice to comply with the public health and the emergency service by-laws. However, Changing Tides indicated that it had no responsibility to the illegal occupiers since it had purchased the property for redevelopment but was unable to take possession of the property.[253] The initial attempt by Changing Tides was unsuccessful. Upon commencement of the proceedings to obtain possession of the building, Changing Tides cited the City as an interested party in the eviction proceedings stating that it had a direct or substantial interest in the matter and therefore, joinder was inevitable.[254]

The SCA underscored the importance of joinder of municipalities by stating that even though the applicant may have considerable information, there would be information that would not be within its knowledge.[255] The information that the Court contemplated would not be within the knowledge of the applicant but it is the willingness and ability of the local authority to deal with the problem of homelessness that would be caused by evictions.[256] That raises the essence and importance of joinder of municipalities in eviction proceedings.

[249] Ibid Para 2.
[250] Ibid.
[251] Ibid.
[252] Ibid.
[253] Ibid Para 3.
[254] Ibid.
[255] Ibid Para 35.
[256] Ibid.

The SCA further stated that joinder of municipalities is considered whenever a party has a direct interest in the outcome of the matter.[257] The Court established that in granting an order for eviction, many occupiers would have been rendered homeless. In order to protect the occupiers from homelessness, the Court enjoined the municipality in order to enable it to discharge its functions in accordance with the provisions of PIE.[258]

The SCA underscored that the joined municipalities must file a report detailing its housing policy and provided guidance on the contents of the report. The SCA observed that the report should contain the information held by the municipality in respect to the building or property and the number of people living on the property, taking into consideration people living with disability, children, the elderly and households headed by women.[259] The report should also explain whether it is in the considered view of the municipality whether the eviction would result in homelessness.[260] The municipality must also explain the implications for delay in evicting the unlawful occupiers, details of previous engagements with the occupiers and the possibility of engaging the parties concerned in mediation.[261]

The case laid out three important principles which can be useful for Kenyan courts and county governments in protection against forced evictions. Firstly, the Court must consider the needs of the occupiers where it seems that an eviction might lead to homelessness. Secondly, municipalities are under an obligation to file detailed reports to Court and respond to the specific needs of the occupiers and when they will be able to provide accommodation. Thirdly, the Court, rather than the municipality, after identifying all the relevant circumstances should decide on the particular occupiers who should be provided with alternative accommodation.

In *ABSA Bank Bpk v Murray and Another*,[262] the Court stated that a property owner seeking an order of eviction in terms of PIE needs to serve notice of the proceedings on the relevant municipality as part of the procedural requirement. The case concerned an application by ABSA bank after it had advanced a loan to P Murray and J Murray, the respondents and mortgagors in the case. The mortgage was registered against the title to the property owned

[257] Ibid Para 37.
[258] Ibid.
[259] Ibid Para 40.
[260] Ibid.
[261] Ibid Para 40 (a-g).
[262] (2003) ZAWCHC 48 (18 September 2003).

jointly by the respondents.[263] The mortgagors defaulted in paying the mortgage prompting Absa Bank to purchase the property at a public auction. However, the bank was not able to get vacant possession since the respondents remained in occupation of the property.[264] The bank filed the application for eviction of the respondents under Section 4 of PIE.

The High Court observed that Section 4 (2) of PIE places a procedural duty upon the owner of a property to serve notice on the municipality within which the property is located. The High Court stated that:

> …the procedural burdens placed on a property owner seeking an eviction order in terms of PIE include the need to serve notice of the proceedings on the relevant municipality. The contextual link between PIE and Section 26 of the Constitution is the apparent basis for this procedural provision. Municipalities are the organs of government which, with financial and other support from the national and provincial spheres of government, fulfil the primary role of discharging the constitutional duty on the State in terms of s 26(2) of the Constitution to achieve the progressive realisation of the right to access to adequate housing.[265]

The High Court explained the link between Section 26 (2) of the Constitution and Section 4 (2) of PIE. The provisions within the Constitution and PIE form the basis of the procedural provisions that require joinder of municipalities in eviction proceedings. The High Court further observed that municipalities are strategically placed to discharge the constitutional duty of achieving progressive realisation of the right to housing.[266]

The High Court also observed that the municipalities were expected to provide information to the Court in respect to matters affecting the property, availability of accommodation, basic health amenities and the consequences of an eviction on the occupiers, especially the vulnerable such as children, the disabled and the elderly.[267] The information provided by the municipalities pursuant to the provisions of Section 4 (2) of PIE facilitates the Court to arrive at a decision that is just and equitable for the occupiers.

The High Court observed that the respondents had been aware for over a year of the bank's intention to evict them.[268] The respondents had continued to occupy the property without recompense to the owner and in the High Court's opinion, they had adequate time to prepare

[263] Ibid Para 1.
[264] Ibid Para 2.
[265] Ibid Para 40.
[266] Ibid.
[267] Ibid Para 41.
[268] Ibid Para 48.

to vacate the property.[269] The High Court observed that by virtue of Section 4 (8) and (9) of PIE, the period of approximately six weeks' notice to vacate the property before an eviction order could be executed, was just and equitable in the circumstances and consequently ordered for eviction of the respondents.[270]

The High Court in the *ABSA Bank Bpk* case laid out the principle that in deciding whether or not to grant an eviction order, the Court has the obligation to have regard for all relevant circumstances.[271] The municipalities have the statutory obligation to provide the relevant information to the Court. However, in this case, the notice in terms of Section 4 (2) of PIE was served on the municipality but the municipality did not submit any report or comments to the High Court.[272] The High Court observed that this failure by the municipality hampers the ability of the Court to make decisions that are just and equitable.[273]

In *Sailing Queen Investments v The Occupants of LA Colleen Court,*[274] the High Court also ordered joinder of the municipality as an important component of arriving at a decision that is just and equitable in terms of PIE. The case concerned an application for joinder of the City of Johannesburg in an application to evict the occupants of La Colleen Court and for pausing the main eviction application pending determination and granting of the relief sought by the occupants.[275]

The High Court observed that the interests of the parties would be properly protected once the municipality had been joined in the eviction proceedings.[276] The High Court further observed that it would be in a proper position to address the issues raised by this particular eviction application the moment all the relevant parties are properly represented in the proceedings.[277] The High Court stated that in the circumstances where individuals in desperate need are faced with eviction, it is just and equitable that the municipality be

[269] Ibid.
[270] Ibid Para 50.
[271] Van Wyk (note 12 above) 57.
[272] The *ABSA Bank Bpk* case (note 262 above) Para 41.
[273] Ibid.
[274] 2008 6 BCLR 666 (W).
[275] Ibid Para 1.
[276] Ibid Para 18.
[277] Ibid.

enjoined to the proceedings to furnish the courts with progress reports in respect of persons occupying the premises which are the subject matter in the proceedings.[278]

The High Court stated that the municipality is instrumental in the proceedings because it demonstrates to the Court how it fulfils the constitutional obligation to the occupants and how it takes responsibility for the consequences that may arise and have implications on the rights of the applicants.[279] Consequently the High Court paused the eviction application pending a report on the availability of alternative accommodation being delivered by the municipality.

The *Sailing Queen* case demonstrates how some courts are reluctant to order evictions without joinder of the municipality in eviction proceedings. The principle laid out in this case is that any stalemate between the private owner of a property and an unlawful occupier can only be broken by the State.[280] The implication of the decision by the High Court is that a private owner who proceeds with eviction would not succeed against an occupier who would be rendered homeless if the State is not made party to the proceedings.[281] The Court should demand the State to be flexible and enable administrative measures to find solutions for unlawful occupiers who are at risk of homelessness.[282]

The case of *Cashbuild (South Africa) (Pty) Ltd v Scott and Others*,[283] reinforced the obligation to undertake mediation in terms of Section 7 of PIE. The case concerned an application by Cashbuild (South Africa) (Pty) Ltd (Cashbuild) for eviction brought to court under Section 4 (2) of PIE. Cashbuild and Scott entered into a Deed of Alienation in respect of the property, on 15 June 2004.[284] Scott breached the terms of agreement which entitled Cashbuild to cancellation of the contract. Upon cancellation of the Deed of Alienation, Cashbuild's attorney issued Scott with a seven days' notice to vacate the property citing unlawful occupation of the property.[285]

The High Court observed that a municipality is obligated to initiate the process of mediation under Section 7 of PIE by appointing one or more persons with expertise in dispute resolution, in an endeavour to settle any dispute upon receipt of an eviction notice under

[278] Ibid.
[279] Ibid Para 16-19.
[280] Wilson (note 23 above) 288- 289.
[281] Ibid 289.
[282] Ibid.
[283] 2007 (1) SA 332 (T).
[284] Ibid Para 2.
[285] Ibid Para 3.

Section 4 (2) of PIE.[286] The High Court further observed Section 7 (1) of PIE contemplates the existence of a dispute which a municipality must attempt to mediate and settle.[287] The High Court subsequently issued an order in terms of Section 8 (1) of PIE after the municipality had ensured that a dispute had been mediated and settled in terms of Section 7 (1).[288]

The High Court stated that if municipalities resolved the issue of the unlawfulness of the occupation and what comprises a just date for the unlawful occupier to vacate, such issues need no longer come to Court as disputes, and the proceedings would be greatly facilitated by virtue of the intervention by municipalities.[289] Municipalities should intervene in instances where the notices under Section 4 (2) of PIE are defective by ensuring that they are joined and cited as respondents to any eviction proceedings where there is a dispute or a potential dispute between an owner and unlawful occupiers.[290]

The High Court ordered joinder of the municipality. The essence of the order is that the eviction issue could not be resolved until the municipality had been joined and given an opportunity to consider the facts of the case. This case illustrates the essence of the role of municipalities in mediation of disputes between the parties.

Van Wyk observes that joinder enhances convenience since time, effort and costs are saved by joining parties in one action instead of bringing separate actions.[291] Van Wyk further observes that eviction proceedings become effective and yield the required results when all relevant parties involved in the process, with provision of the necessary information, will enable the Court to come to a just and equitable decision.[292] Joinder of municipalities in eviction proceedings and compulsory mediation are important tools for engagement to prevent homelessness and for provision of crucial information to a court hearing of an eviction application, especially on whether or not alternative accommodation is available.[293]

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[286] Ibid Para 21.
[287] Ibid.
[288] Ibid Para 23. Section 8 (1) provides that 'No person may evict an unlawful occupier except on the authority of an order of a competent court.'
[289] Ibid Para 27.
[290] Ibid.
[291] Van Wyk (note 12 above) 61.
[292] Ibid.
[293] Ibid; *The Port Elizabeth Municipality* case (note 74 above) Para 39.

Joinder of municipalities in eviction proceedings can help address the problem of arbitrary evictions in Kenya. Firstly, county governments can be joined to litigation in order for them to provide certain information in relation to alternative accommodation and their ability to provide it if evictions are inevitable. Secondly, county governments may have direct, substantial and material interests in eviction matters and the Constitution can be reformed to obligate them to provide alternative accommodation and play the role of mediator between the property owners, the occupiers and the State. Thirdly, the Constitution and legislation in Kenya can be reformed to always join county governments as party to the eviction proceedings in cases where occupiers may be rendered homeless due to evictions.

6.5.2.2 Provision of Alternative Accommodation

South Africa has adopted as part of the best practices, the provision of alternative accommodation as a means to prevent homelessness. The courts have ensured that they grant orders to the municipalities to provide alternative accommodation as part of eviction orders where people are being evicted into homelessness. However, according to SERI, the South African courts have a balance between the concerns raised by municipalities for inability to provide alternative accommodation and the right of access to adequate housing of impoverished occupiers.[294] Municipalities have raised arguments relating to resource constraints among other reasons for their inability to provide adequate alternative accommodation.

The Constitutional Court in *Port Elizabeth Municipality* case laid out three principles that the Court would consider before giving an eviction order. Firstly, the nature of the occupation of land and the degree of emergency or desperation that drove people to find accommodation. The Court observed that:

> …the well-structured housing policies of a municipality could not be allowed to be endangered by the unlawful intrusion of people at the expense of those inhabitants who may have had equal claims to be housed on the land earmarked for development by the applicant. Municipalities represent all the people in their area and should not seek to curry favour with or bend to the demands of individuals or communities, whether rich or poor. They have to organise and administer their affairs in accordance with the broader interests of all the inhabitants.[295]

Secondly, the Court laid out the principle of the period of the unlawful occupation. The Court observed that it should be cautious in evicting well-settled families with strong local

[294] SERI (note 5 above) 43.
[295] *The Port Elizabeth Municipality* case (note 74 above) Para 26.

ties compared with persons who had recently moved onto land and erected shelters.[296] The Court observed that the longer the period of habitation on the land, the greater the protection afforded by the courts.[297]

Thirdly, the Court laid out the principle of availability of suitable alternative accommodation, even if it is only temporary especially for settled communities. The Court observed that local authorities bear the constitutional duty to ensure alternative accommodation or land is made available before evictions are carried out.[298] The Court stated in general terms, that a court should be reluctant to grant an eviction against relatively settled occupiers unless it is satisfied that a reasonable alternative is available, even if only as an interim measure pending ultimate access to housing in the formal housing programme.[299]

The Constitutional Court in the *City of Johannesburg Metropolitan Municipality v Blue Moonlight Properties 39 (Pty) Ltd & the Occupiers of Saratoga Avenue,*[300] dealt with the rights of Blue Moonlight Properties 39 (Pty) Ltd, where the owner of the property with the obligation of the City had to provide alternative housing for the occupiers if they are evicted. The case concerned the fate of 86 occupiers who were poor and who unlawfully occupied a property consisting of old dilapidated commercial premises with a factory building and garages within the City of Johannesburg.[301]

The owner had bought the property with the knowledge of occupancy of the occupiers and was intending to evict them and develop the property in order to generate a higher income.[302] The occupiers demonstrated to the Court that eviction would result in homelessness and enjoined the City in the eviction proceedings in order to seek the Court to order provision of alternative accommodation.[303]

The Court stated that the national, provincial and local levels of government are mandated to realise the right of access to adequate housing under Section 26 of the Constitution in cooperation with each other.[304] The Court observed that the responsibilities of the three levels

[296] Ibid Para 27.
[297] Ibid.
[298] Ibid Para 28.
[299] Ibid.
[300] (2011) ZACC 33 CCT 37/11.
[301] Ibid Para 1.
[302] Ibid Para 1
[303] Ibid
[304] Ibid Para 42.

of government with regard to housing are intertwined and should be involved in legal proceedings regarding eviction and access to adequate housing.[305]

The Court addressed the practical questions on whether the occupiers had to be evicted to allow the owner to fully exercise his rights regarding the property.[306] The City argued that it did not bear responsibility for providing accommodation to the occupiers in terms of the circumstances in the case.[307] The Court ruled that the City was obligated by the Constitution and legislation to provide emergency housing within its jurisdiction. The Court stated that:

> …the City provided information relating specifically to its housing budget, but did not provide information relating to its budget situation in general. We do not know exactly what the City's overall financial position is. This Court's determination of the reasonableness of measures within available resources cannot be restricted by budgetary and other decisions that may well have resulted from a mistaken understanding of constitutional or statutory obligations. In other words, it is not good enough for the City to state that it has not budgeted for something, if it should indeed have planned and budgeted for it in the fulfilment of its obligations.[308]

The case demonstrates that the State cannot use resource constraints or any other reason for not providing alternative accommodation. The case ensured that the State does not evade its constitutional and legislative obligation to provide alternative housing.

The Court declared the housing policy of the City unconstitutional to the extent that it excluded the occupiers and other persons evicted by private property owners from consideration for temporary accommodation in emergency situations.[309] The Court ordered the City to provide the occupiers with temporary accommodation in a location near the property, provided that the occupiers were still resident at the property.[310]

The *Blue Moonlight* case laid down the principles of the obligations of the City to provide adequate alternative accommodation, the sufficiency of the City's resources and the constitutionality of the City's emergency housing policy.[311] The principles laid out in this case can inform Kenya in the context of protecting the rights of evictees by providing alternative accommodation upon evictions.

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[305] Ibid Para 45.
[306] Ibid.
[307] Ibid Para 48 & 49.
[308] Ibid Para 74.
[309] Ibid Para 104.
[310] Ibid.
[311] Williams (note 7 above) 841.

In the *Changing Tides* case, the SCA outlined the role of municipalities in provision of alternative accommodation.[312] The SCA observed that municipalities are mandated to expedite the process of relocating occupiers who are living in conditions of utmost squalor at the risk of lives and health.[313] The SCA observed that municipalities should provide temporary emergency accommodation and report to the court on the accommodation that will be made available to all the occupiers and include the timelines for making such accommodation available.[314] The SCA elaborated that the report by municipalities should be accompanied by affidavits sworn by the relevant officials verifying the information and specifically give reasons for selecting the location for the alternative accommodation.[315]

In the *Joe Slovo* case, the Constitutional Court ordered the provision of adequate alternative accommodation in the form of temporary residential units to the residents of Joe Slovo and prescribed the nature of the temporary emergency accommodation and detailed the requirements for the physical structure of the alternative accommodation. The Court guided that the temporary emergency accommodation should be at least 24 m^2 in size, have access to tarred roads and must be clearly marked for purposes of identification.[316] The Court further guided that the accommodation should have a galvanised iron roof and be in reasonable proximity to amenities such as electricity, communal ablution facility and toilet facilities with water-borne sewerage and reasonable provision of fresh water.[317]

The Court also provided the parameters of the information to be provided by the municipalities. The information must include the names, details and relevant personal circumstances of those who are to be affected by each relocation, the time, manner and conditions for relocation of each affected household and the precise temporary residential accommodation units to be allocated to those persons who are to be relocated.[318] The Court further elaborated that information in respect of transportation of the people to be relocated from the temporary residential accommodation units to amenities, including schools, health

[312] The *Changing Tides* case (note 248 above) Paras 54 & 55.
[313] Ibid Para 54.
[314] Ibid Para 56 & 65.
[315] Ibid.
[316] The *Joe Slovo* case (note 104 above) Para 10 & 105.
[317] Ibid Para 5.
[318] Ibid Para 11.

facilities and places of work and the allocation of permanent housing must be made available to those relocated to temporary residential accommodation units.[319]

The case of *Baartman and Others v Port Elizabeth Municipality*[320] affirmed that alternative accommodation must guarantee a degree of security of tenure.[321] The Port Elizabeth municipality applied to the High Court for an order of eviction of the appellants from privately owned land.[322] The land formed part of an undeveloped piece of land within a proclaimed township and fell within the area of jurisdiction of the municipality. The appellants had erected shacks on the property without first obtaining consent from the municipality, which they required.[323]

The High Court granted the order sought by the municipality and directed that the appellants vacate the property within a period of eight weeks.[324] The matter was subsequently appealed to the SCA. The SCA ruled on the aspect of suitability of the alternative accommodation. The SCA noted that the appellants did not object to being moved from the property but wanted to settle on land with assurance of security of tenure.[325] The SCA observed that the municipality was reluctant to commit itself to provide alternative accommodation although it had adequate land available for settlement which could guarantee security of tenure.[326] The SCA further observed that in the absence of assurance that the appellants would have some measure of security of tenure, the High Court should not have granted the order for eviction sought by the municipality.[327] Consequently, the SCA set aside the eviction order by the High Court.[328]

The jurisprudence in *Blue Moonlight*, *Joe Slovo, Port Elizabeth Municipality*, *Baartman* and *Changing Tides* has elicited practices that Kenya can learn from in protection against homelessness caused by evictions. Firstly, the jurisprudence demonstrates that the State bears the duty to provide adequate housing and temporary alternative accommodation if evictions would lead to homelessness. Secondly, the jurisprudence demonstrates that municipalities play a critical role and should take positive action in provision of alternative accommodation.

[319] Ibid.
[320] (2003)ZASCA 99, 2004 (1) SA 560 (SCA) Paras 14 & 19.
[321] Wilson (note 103 above) 285.
[322] Ibid Para 2.
[323] Ibid Para 3
[324] Ibid.
[325] Ibid Para 19
[326] Ibid.
[327] Ibid.
[328] Ibid Para 20.

Kenya can learn from the principles laid down in the jurisprudence to reform legislation to deal with provision of adequate alternative accommodation and emergency accommodation to prevent homelessness upon evictions. The legislation should accord county governments the role in facilitating the determination of whether or not the courts can grant eviction orders.

6.6 Conclusion

The chapter has evaluated the best practices developed by South Africa in respect of forced evictions. South Africa was selected because it has a more developed eviction regime compared with the Kenyan system. The chapter evaluated the constitutional and legislative provisions relating to evictions in South Africa. More importantly, it evaluated the jurisprudence and judicial developments in South Africa which are imperative in informing best practices that can be infused in the Kenyan legal system.

The chapter discussed protection from forced evictions and the right to housing under the Constitution. The chapter discussed the legislative framework that protects against arbitrary evictions in South Africa which include PIE, ESTA and IPILRA. Within the provisions of PIE, the chapter discussed protection of forced evictions on the themes of eviction from private land and eviction from informal settlements. The chapter also evaluated the protection of traditional communities in South Africa who do not have formal rights to land through IPILRA and jurisprudence. The legislative framework elicited practices that Kenya can learn from in protection against arbitrary evictions.

The chapter established that the Constitution has breathed life into housing and eviction relations which effectively balances the right to property for the property owners with the right of access to adequate housing for occupiers. The chapter also established that property owners are obligated to meaningfully engage with the occupiers prior to instituting eviction proceedings and further place relevant information before the Court to enable it to arrive at a just and equitable decision for unlawful occupiers after considering all the relevant circumstances. This demonstrates that the Constitution has granted unlawful occupiers both substantive and procedural protection from arbitrary evictions.

The chapter discussed recent developments which have helped mitigate arbitrary evictions in South Africa. The developments include meaningful engagement, joinder of municipalities in eviction proceedings and provision of adequate alternative accommodation by municipalities.

The development of housing and eviction jurisprudence buttressed the right to dignity in the Bill of Rights and enhanced protection against forced evictions. The chapter discussed and analysed the recent developments as good practices that Kenya can adopt in order to mitigate the problem of forced evictions.

The chapter evaluated the Constitutional Court's contribution in *Occupiers of 51 Olivia Road* and *Residents of Joe Slovo* on interpretation of what is just and equitable in terms of PIE and the essence of meaningful engagement before granting an order for eviction. The High Court *Absa Bank Bpk, Sailing Queen* and *Cashbuild* cases as well as the SCA in the *Changing Tides* case strengthened the concept of joinder of municipalities in eviction proceedings by affirming that the Constitution and legislation have granted a mandate to municipalities as an important component of protection against arbitrary evictions. The courts have underscored the importance of joinder as a tool that enables municipalities to provide relevant information before the Court arrives at decisions that are just and equitable in terms of PIE.

The chapter established that municipalities are strategically placed and mandated by law to adopt a reasonable housing policy and have become an important component in eviction proceedings. The policy is not only aimed at provision of sustainable housing solutions, but also aimed at provision of temporary emergency accommodation and adequate alternative accommodation to prevent homelessness due to evictions. The chapter also established that provision of adequate alternative accommodation is an important component of the Court's consideration on whether an eviction is just and equitable in the particular circumstances. Municipalities are also required to engage meaningfully with the property owners and the occupiers during the eviction proceedings.

The chapter argued that the Constitution, legislation and jurisprudence on forced evictions in South Africa have substantially expanded the opportunities for individuals and communities to protect themselves from forced evictions in instances of unlawful occupation of land. The legal framework has also enhanced prevention of vulnerability homelessness by granting the right to housing. The chapter proposed that the constitutional framework, legislation, norms, jurisprudence and judicial developments in South Africa contains best practices that Kenya can learn from to address the problem of forced evictions. Lack of such practices in Kenya constitutes a significant gap in land rights and protection from forced evictions which this chapter sought to fill.

The next chapter is on findings, conclusions and recommendations. Since protection against arbitrary evictions can be realised through a robust constitutional and legislative framework, the chapter draws best practices from South Africa, which if entrenched into the Kenyan legal framework would help mitigate forced evictions. The chapter highlights the objectives of the thesis, conclusions on the research questions and the hypothesis. The chapter gives recommendations on reform of the Kenyan law on evictions.

CHAPTER 7:
FINDINGS, CONCLUSION AND RECOMMENDATIONS

7.1 Conclusion

The general objective of the study was to explore land rights in Kenya and the role of law in protection against forced evictions. The thesis intended to critically evaluate the Kenyan law in relation to land tenure and the problem of forced evictions in Kenya.[1] The thesis further intended to analyse the Kenyan constitutional and legislative framework and the attempts that the government of Kenya has made to protect people and communities against forced evictions.[2] Additionally, the thesis was premised on the need to proffer suggestions for reform in the law and the legislative framework for Kenya in dealing with issues presented by tenure insecurity as far as forced evictions are concerned.[3] This could not be achieved without understanding several factors based on the research questions: The summary of the key findings and the overall conclusion was by the research questions as set out in chapter one:[4]

1. What are the limitations of the legal and institutional framework in addressing the problem of forced evictions in Kenya?
2. What are the legal and policy measures that are necessary to mitigate the problem of forced evictions?
3. What can Kenya learn from another comparable jurisdiction in addressing the problem?

The thesis sought to evaluate the human rights issues and practices provided in international law in respect of land rights and forced evictions and their relevance for addressing forced evictions in Kenya. The thesis engaged with human rights issues and practices provided in international law as part of delineating the extent of obligations imposed on Kenya by international norms with regard to protection against forced evictions. The thesis also sought to draw best practices from the South African legal framework, norms, jurisprudence and judicial developments with a view to recommending the incorporation of best practices on

[1] Chapter 1 Section 1.7.
[2] Ibid.
[3] Ibid.
[4] Chapter 1 Section 1.5

land rights and protection against forced evictions into the Kenyan legal system.[5] South Africa was selected because it has experienced forms of forced evictions and has developed progressive laws, norms and jurisprudence that Kenya can learn from.

The aim of this chapter is to present the findings of the study and offer recommendations.

7.2 Major Findings of the Study

7.2.1 Security of Tenure

Security of tenure is a critical theme in this thesis. The problem of tenure insecurity in Kenya can be traced from the dispossession that took place when the British Crown (the Crown) took over the affairs of the country as her colony.[6] The Crown firstly seized land and evicted the native occupants and settled them elsewhere especially on non-productive land through the theory of *terra nullius* which means empty, unoccupied and waste land.[7] The second method involved the imposition of the notion of private property.[8] The aspect of private property replaced the traditional communal nature of landholding which in turn led to expropriation of the native communities' land rights.[9]

The thesis demonstrates that colonialism and imposition of English law in Kenya destroyed traditional patterns of land tenure and became a contributing factor to forced evictions. Colonialism was a key factor in the evolution of the Kenya law relating to property. The implication of imposition of English law was the introduction of law relating to property, disruption of customary land tenure and forceful removal of Kenyans from their land. Colonialism introduced the western notion of property which replaced the traditional land tenure system by giving exclusive rights of land owned by Kenyan communities to the British Crown.

The Crown declared ownership of all land within the Kenyan protectorate and undermined the traditional resource management institutions and social structures developed by the

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[5] Ibid.

[6] C Polsinelli 'Right to Land-Right to House and Adequate Standard of Living' in *Human Rights Litigation and the Domestication of Human Rights Standards in Sub Saharan Africa* AHRAJ Casebook Series 1 (2007) 147-151.

[7] K Sing'oei 'Disarming the Leviathan: Endorois Decision and the Search for Inclusive Social-economic Rights in Kenya' in International Commission of Jurists Kenyan Section *Judicial Enforcement of Social-economic Rights under the New Constitution: Challenges and Opportunities for Kenya* (2011) 314.

[8] Polsinelli (note 6 above).

[9] PK Mbote *Property Rights and Biodiversity Management in Kenya: The Case of Land Tenure & Wildlife* (2002) 1-10.

Kenyan communities.[10] That marked the change of common property regimes into individualised property regimes. By asserting original titles to land in Kenya, the Crown claimed that Kenyan communities did not own any land and thus thereby forcibly evicted them from their lands.

The thesis found that forced evictions are a direct result of insecure land tenure. The thesis demonstrates the fact by using case studies of both rural and urban communities. In particular, the thesis cast the spotlight on forced evictions within informal settlements in urban areas, and forced evictions affecting both the indigenous peoples and rural communities. Lack of tenure security of land rights facilitated eviction of indigenous peoples and communities especially on the Kenyan coast.[11] By use of the case studies, the thesis illustrates that insecure tenure to land enhances the problem of forced evictions.

The thesis demonstrates that registration of title to land and possession of title documents to land enables individuals to enjoy security of tenure and exclusive possessory rights over land.[12] Holders of formal titles to land are assured of ownership since registration of title documents ascertains the tenure, the mode of land holding and the size or acreage.[13]

7.2.2 Protection from Forced Evictions and Related Rights

Interdependence of all rights, the impact of forced evictions on human dignity and justification for forced evictions are theoretically key foundations for protection from forced evictions which is discussed in Chapter 2. Protection from forced evictions should be understood within the realm of interdependence of rights, the impact of forced evictions on human dignity and justification for forced evictions.[14] The Chapter illustrates that forced evictions have implications and affects other human rights negatively. Land rights and protection from forced evictions have implications on other rights such as the right to housing and the right to human dignity.[15] As demonstrated in the Chapter, forced evictions have an

[10] J Lonsdale & B Berman 'Coping with the Contradictions: The Development of the Colonial State in Kenya, 1895-1914' (1979) 20 *Journal of African History* 495-505; HWO Okoth-Ogendo *Tenants of the Crown: Evolution of Agrarian Law and Institutions in Kenya* (1991) 1-10.

[11] F Kariuki & R Ng'etich 'Land Grabbing, Tenure Security and Livelihoods in Kenya' (2016) 9 *African Journal of Legal Studies* 95.

[12] P Onalo *Land Law and Conveyancing in Kenya* (1986) 173.

[13] Ibid.

[14] C Scott 'Interdependence and Permeability of Human Rights Norms: Towards a Partial Fusion of the International Covenants on Human Rights' (1989) 27(3) *Human Rights Norms* 771.

[15] Section 2.2.2 of Chapter 2; Section 3.5.2.1 of Chapter 3 on the analysis of the *Social and Economic Rights Action Centre for Social Rights (SERAC) v Nigeria* Communication 155/96 15th ACHPR AAR Annex V (2000-

impact on the human dignity of individuals and communities, both physical and psychological, and affect other human rights such as the right to life, movement and health, among others. Forced evictions have substantial and negative effects on the lives and livelihoods of affected people.[16] Many people are left homeless, landless, without access to food and other basic amenities and sometimes even loss of life.

The thesis demonstrates that forced evictions of indigenous peoples and rural communities from their land, undermine their dignity. Indigenous peoples are subjected to forced evictions for resource extraction, agribusiness, nature conservation initiatives and development projects, including pipeline and dam construction.[17] The evictions are often carried out through violence and harassment, without effective consultation and without free, prior and informed consent as well as without just and fair compensation.[18] The thesis demonstrates that forced evictions threaten the indigenous peoples' right to life, the right to protection by the law and the right to not be discriminated against. The evictions further impoverish indigenous peoples socially, economically and also culturally undermine their efforts to alleviate poverty and limit their potential to achieve sustainable development.

The International Covenant on Economic, Social and Cultural Rights (ICESCR) provides for recognition of the right of everyone to an adequate standard of living which include the right to adequate housing, and to the continuous improvement of living conditions.[19] The United Nations (UN) Committee on Economic, Social and Cultural Rights (CESCR)[20] has issued General Comments No. 4 on the right to adequate housing[21] and No. 7 on protection against forced evictions.[22] The thesis, guided by the persuasive nature of the two General Comments established that forced evictions have implications on other rights such as the right to life, the

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2001). At Para 59, the African Commission on Human and Peoples' Rights observed that eviction of the Ogoni people affected their enjoyment of other rights and freedoms provided in the African Charter on Human and Peoples' Rights.

[16] C Polsinelli 'Right to Land-Right to House and Adequate Standard of Living' in International Commission of Jurists Kenyan Section *Human Rights Litigation and the Domestication of Human Rights Standards in Sub Saharan Africa* (2007) 152.

[17] UNGA 'Report of the Special Rapporteur on Adequate Housing as a Component of the Right to an Adequate Standard of Living, and on the Right to Non-discrimination in this Context (2019) UN Doc A/74/183 Para 31.

[18] Ibid.

[19] Article 11 of the International Covenant on Economic, Social and Cultural Rights (1966) UN Doc A/6316.

[20] The Committee on Economic, Social and Cultural Rights (CESCR) is a United Nations body composed of independent experts who monitor the implementation of social economic and cultural rights by member states to the ICESCR. CESCR was established under the Economic and Social Council Resolution 1985/17 of 28th May 1985. < www.ohchr.org> last accessed 16 January 2020.

[21] UN CESCR General Comment No. 4 'The Right to Adequate Housing' (1991) UN Doc No. E/1992/23.

[22] UN CESCR General Comment No. 7: The Right to Adequate Housing (Art.11.1): Forced Evictions (1997) UN Doc E/1998/22.

right to security of the person, the right to non-interference with privacy, family and home and the right to the peaceful enjoyment of possessions.[23]

The thesis dealt largely with the right to housing and established that it is central to enjoyment of all socio-economic rights (SERs) and includes the right to security, peace and inherent dignity. The right to housing is an important component and a bulwark for protection against arbitrary evictions. This is because forced evictions of occupiers from their homes has adverse effects on individuals, families and communities and violates their dignity. The thesis established that the right to housing should not be interpreted restrictively to equate merely to a roof over one's head or a commodity.[24]

7.2.3 Prevalence of Forced Evictions in Kenya

The thesis established that forced evictions have adverse effects on people, both physical and psychological. The thesis selected the *Ogiek, Endorois* and *Mijikenda* communities and evictions in urban areas to demonstrate the prevalence of issues of forced evictions.[25] The discussions in Chapters 1, 2 and 4 demonstrate the extent of the problem of forced evictions in Kenya. Chapter 2 in particular discussed landholding in Kenya and provided the statistics of formal title holders in Kenya to demonstrate that many people do not hold formal titles to the land they occupy.

Chapter 2 discussed forced evictions affecting people living in informal settlements, indigenous peoples and other Kenyan communities with specific reference to communities living on the Kenyan coast. The prevalence of forced evictions was supported by statistics. The chapter established that forced evictions are a direct result of insecure land tenure and demonstrated that non-holders of formal titles to land are vulnerable to forced evictions in Kenya.

Prevalence of forced evictions as demonstrated in Chapter 2 take on a variety of forms. Regarding forced evictions in informal settlements, the UN Habitat reported that there are over two million people who live in informal settlements with threats of forced evictions

[23] Ibid Section 4.
[24] Ibid.
[25] Section 2.5 of Chapter 2.

facing people who live in Kibera, the largest informal settlement in the capital city Nairobi.[26] The UN Habitat reported that over 300 000 informal settlers of the Kibera slums in Nairobi were forcefully evicted by ministries within the Kenyan national government on the pretext that they were living in dangerous areas.[27] The Kenyan government justified the evictions of occupiers of the Kibera slums by stating that the land had been planned for future expansion of roads and power lines as well as land planned for railway reserves.[28]

Regarding forced evictions of indigenous peoples, the *Ogiek* community had been forcefully evicted from its land, firstly by the colonial administration and subsequently by the post-independence successive governments.[29] The *Endorois* community was forcefully evicted from its land as a result of the formation of the Lake Hannington game reserve in 1973.[30] Chapter 2 illustrates that the *Ogiek and* the *Endorois* communities were not compensated for the loss of their land. The communities sought redress locally and regionally to have their rights vindicated. The thesis demonstrated that the communities were settled in areas incompatible with their pastoralist way of life, culture and religion and the land rights of the indigenous peoples have not been vindicated.

Chapter 2 also illustrates that *Mijikenda* communities of the Kenyan coast have suffered from forced evictions. The communities were evicted from their ancestral lands at the height of political conflicts between the coastal communities and the Arabs after independence in 1963.[31] Forced evictions of the communities from their lands were also escalated by absentee landowners who held formal titles. The implication of absentee landowners was twofold. Firstly, it precluded the community from both the use and the land control rights and thus

[26] UN Habitat *Forced Evictions, Global Crisis, Global Solutions A Review Of the Status of Forced Evictions Globally Through the Work of the Advisory Group on Forced Evictions, UN Habitat and Other International Actors* (2011) < www.scribd.com.documents> accessed 12 March 2018 [36].
[27] Ibid.
[28] KM Otiso 'Evictions in Nairobi: Why the City has a problem and what can be done' in *The Star* (Nairobi) 28 July 2018; UN Habitat 2011 (note 26 above) 36-38. The 2011 Report has documented various cases of forced evictions within the capital city Nairobi in Kibera slums, the biggest informal settlement in Kenya.
[29] N Sophia, A Susan & O Caleb 'Forces that Occasioned the Mau *Ogiek* People's Ethnic Dress, Kenya' (2012) 13 *International Journal of Humanities and Social Science* 192.
[30] United Nations Environmental Programme and Centre for International Environmental Law *Compendium on Human Rights and the Environment* (2004) 52.
[31] K Kanyinga *Re-Distribution From Above: The Politics of Land Rights and Squatting in Coastal Kenya* (2000) 70-71.

reduced the amount of public land on which the landless could be settled.[32] Secondly, the land rights of the communities were made fragile resulting in mass evictions.[33]

7.2.4 Best Practices in Protection against Forced Evictions

Chapter 3 evaluated the status of international law under the Kenyan Constitution and the international legal framework for protection against forced evictions. The chapter shows that international and regional legal instruments have principles worth incorporating into the Kenyan legal framework to protect the right to housing and protect against forced evictions. It also shows that international law principles are essential in assisting Kenyan courts in providing guidance on the content of the right to housing, which is a bulwark against arbitrary evictions.

International legal instruments and jurisprudence influence enactment of legislation domestically and national courts rely on them in making decisions. The thesis considered international best practices and norms developed by States over time. The essence of considering international norms was to contribute to the development of a legal and policy framework in Kenya that would curb forced evictions, or one that ensures adequate protection where such evictions are inevitable.

The thesis shows that international law instruments make provision for protection against forced evictions. The international law instruments include treaties, declarations and agreements. It was argued that protection from forced evictions explicitly involves the ICESCR the relevant General Comments by the CESCR,[34] and decisions made by regional human rights bodies and courts. The thesis discussed jurisprudence on forced evictions by the African Commission on Human and Peoples' Rights (ACHPR)[35] and the African Court on Human and Peoples' Rights.[36]

Chapter 3 demonstrates that Kenyan courts can consider a range of international and regional human rights instruments to develop a substantive interpretation of the right to housing and protection against forced evictions. The wide range of international and regional instruments

[32] Ibid.
[33] Ibid.
[34] General Comment No. 4 (note 21 above) and General Comment No. 7 (note 22 above).
[35] The ACHPR is established under Article 30 of the African Charter with the mandate of promotion and protection of human rights in Africa. It was officially inaugurated on 2 November 1987.
[36] African Union 'Protocol to the African Charter on Human and Peoples' Rights on the Establishment of an African Court of Human and Peoples' Rights' (2004) OAU Doc OAU/LEG/EXP/AFCHPR PROT (III) <www.acphr.org> accessed 1 February 2020.

would assist the courts to develop jurisprudence aimed at addressing the problem of arbitrary evictions. The instruments are critical in informing Kenyan law, policy and institutional frameworks on evictions.

Chapter 6 draws on best practices of evictions from South Africa. The chapter considers South Africa for its progressive constitution, legislation, norms and jurisprudence on evictions that can be incorporated into the Kenyan legal framework. The chapter draws lessons and practices from South Africa on the reforms that could inform protection against forced evictions in Kenya. South Africa was selected because it has experienced forms of forced evictions from the apartheid era and has developed laws, norms and jurisprudence that Kenya could learn from. During the apartheid era, the owners of land relied on the *rei vindicatio* in common law to evict illegal occupiers. Common law was applied alongside obsolete eviction laws such as the Prevention of Illegal Squatting Act.[37]

The Constitution of South Africa guarantees the right to housing and expressly prohibits forced evictions within the Bill of Rights.[38] The legislature enacted the Prevention of Illegal Eviction from the Unlawful Occupation of Land Act[39] and Extension of Security of Tenure Act[40] as legislation that protects occupiers of land from forced evictions. The courts have adjudicated substantial cases of evidence of comprehensive jurisprudence on SERs and developed substantive jurisprudence on evictions. The courts have been innovative in crafting innovative remedies in evictions related to private land and within informal settlements as discussed in Chapter 6 of this thesis. The chapter also demonstrated that the South African constitution, legislation and jurisprudence protect traditional communities from forced evictions from their lands.

The principles in the *Government of the Republic of South Africa v Grootboom*[41] case elaborated on the right to housing as an important component of protection against forced evictions within the South African context. The Constitutional Court laid down important principles that can be applicable within the Kenyan context. The case underscored the role of the State in ameliorating the plight of people living in deplorable conditions by providing access to housing, health care, food, water and social security for them and their dependants.

[37] Act 52 of 1951.
[38] Section 26 of the Constitution of the Republic of South Africa 1996 (hereinafter referred to as the South African Constitution).
[39] Land Act 19 of 1998.
[40] Act 62 of 1997.
[41] 2001 (1) SA 46 (CC).

The case set in motion a critical development in the right to housing by requiring the State to provide at least temporary shelter to people affected by evictions.

Chapter 6 found that Section 26 (3) of the South African Constitution and the *Grootboom* case offer useful lessons that can guide legislative and judicial protection of the right to housing that can buttress protection against arbitrary evictions in Kenya. Firstly, they underscore the role of the State in ensuring access to land on an equitable basis. In interpreting Section 26 (3), the *Grootboom* case demonstrates that the right of access to adequate housing does not isolate other rights such as the right to human dignity, freedom, equality, food and clothing. The case expands the right to housing to include aspects of personal intimacy, security and family as important components and the concept of home to imply that housing is of significance, not only as a basic human need but also as a fundamental right which has to be protected by law.

Chapter 6 furthermore found that the principles in *Residents of Joe Slovo Community in Western Cape v Thubelisha Homes*[42] elicits practices that can be applied in Kenya to help address arbitrary evictions. Firstly, the case demonstrates and exemplifies the principle of procedural fairness in the assessment of whether the eviction was just and equitable. Secondly, the case elicits the important aspect of procedural fairness in provision of alternative accommodation before evicting large settled communities. Thirdly, the case applied the principle of justice and equity in consideration of whether to grant an eviction order.

Chapter 6 found that the law plays an instrumental role in protection of rural communities as informal land owners against the potentially harmful effects of commercial mining activities.[43] Meyer observes that legislation should be enacted to provide protection for people who hold informal land rights which would facilitate formalisation of indigenous communities' land rights.[44] The principles laid out in *Baleni v Minister of Mineral Resources*[45] and *Richtersveld Community & Others V Alexkor Limited & Another*[46] are instrumental in protecting informal land owners by establishing a higher standard for

[42] 2010 (4) SA 454 (CC).
[43] Y Meyer '*Baleni v Minister of Mineral Resources* 2019 2 SA 453 (GP): Paving the Way for Formal Protection of Informal Land Rights' (2020) 23 *Potchefstroom Electronic Law Journal* 1 & 2.
[44] Ibid.
[45] 2019 2 SA 453 (GP).
[46] *Richtersveld Community and Others v Alexkor Ltd and Another* (2001) (3) SA 1293 (LCC).

obtaining a mining right over land belonging to communities, and protection from potentially harmful effects of mining activities by non-state actors such as multinational corporations.

Chapter 6 also found that the concepts of meaningful engagement, joinder of municipalities in eviction proceedings and provision of adequate alternative accommodation, developed within the South African legal framework are worth incorporating into the Kenyan legal framework. The role played by municipalities in South Africa would be played by county governments in the Kenyan context. The South African Constitutional Court and other courts have created progressive jurisprudence around the concepts which has proven to be effective in the South African context. Incorporation of such concepts into the Kenyan legal framework would help mitigate arbitrary evictions.

7.2.5 Limitations of the Kenyan Policy, Legal and Institutional Framework on Evictions

The thesis shows that inadequate policy on legal and institutional frameworks leads to vulnerability of people's forced evictions.[47] The discussion and analysis in Chapter 4 on the Kenyan legal framework in relation to land rights and forced evictions demonstrates limitations in protection against forced evictions. The analysis has further demonstrated that the normative and institutional developments on land from the pre-colonial period to the present date, contributed to forced evictions in Kenya.

Chapter 4 also evaluated the right to housing and the right to property in the Constitution as examples to evaluate the effectiveness of the norms in protection against forced evictions. The chapter discussed the national policy framework and the legislative framework in protection against forced evictions in Kenya and found both frameworks ineffective in protection against forced evictions. The chapter found that the policy and legal frameworks dealing with land are lacking in mechanisms to address forced evictions in Kenya.

The chapter further evaluated the role of the Kenyan national policy framework in respect to forced evictions and protection of the right to housing. The chapter established that even though the Land Act made amendments in 2016 to include aspects relating to forced evictions, there is no legislation that specifically addresses the substantive and procedural requirements for evictions as stipulated in international legal instruments.

[47] See Chapters 4 and 5.

Chapter 4 found that despite the fact that forced evictions violate international human rights standards and that the Constitution recognises the right to housing, Kenya lacks substantive legislation that addresses the problem of forced evictions in particular. The chapter further found that even though the policy documents contain scattered general statements on the intention of the State to address the problem of forced evictions and protect the right to housing, there is clearly no single policy that addresses forced evictions. The housing policy in particular falls short of recognising the right to housing as a constitutional right.

Chapter 5 demonstrated that the Kenyan institutional framework is deficient in protection against forced evictions. The chapter established that institutions created by the Constitution and legislation do not adequately protect communities and individuals from forced evictions. The legal framework that has created county governments and constitutional commissions has not specifically mandated the institutions to protect against forced evictions. The chapter further established that county governments as essential institutions did not create a framework within which they can address the problem of forced evictions. There is a need to align the Kenyan legal, policy and institutional framework on evictions with international best standards and practices.

7.3 Recommendations

7.3.1 Tenure Reform

The thesis recommends that land tenure reforms in Kenya would enhance tenure security. The Constitution provides for the right to property[48] and classifies land tenure as public,[49] private[50] and community.[51] However, the provision of the Constitution on security of tenure can be enhanced to better protect individuals and communities from evictions. Since security of tenure can be realised through policy, legal and institutional reforms, the thesis recommends reform in the current constitutional framework to create secure land tenure for individuals and communities whose tenure has been insecure due to the legal framework that existed during the colonial and post-colonial periods. Even though reform has been undertaken on the Constitution and land legislation, it has not been adequate to protect against forced evictions.

[48] Article 40 of the Constitution of Kenya.
[49] Ibid Article 62.
[50] Ibid Article 63.
[51] Ibid Article 64.

The Constitution must be amended in Article 40 so that it explicitly provides for tenure security for both individuals and communities, especially in rural areas. The possible wording could correspond with the provision in the South African Constitution and read as follows: 'a person or community whose tenure of land is legally insecure as a result of policies or laws is entitled, to the extent provided by an Act of parliament, either to tenure which is legally secure or to comparable redress.'

The thesis acknowledges that the Community Land Act (CLA) was enacted to facilitate registration of titles for communities and recognise and protect community land rights.[52] The CLA recognises customary land rights as rights derived from customary law, customs or practices.[53] Even though CLA recognises customary law, it is still subject to the repugnancy clause under the Judicature Act. The repugnancy clause and the inconsistency of customary law to written laws are impediments to tenure security for indigenous peoples and communities.[54]

7.3.2 Need for Infusion of International Standards and Best Practices in Protection against Forced Evictions

The thesis recommends joining municipalities in eviction proceedings to help address the problem of arbitrary evictions in Kenya. Firstly, county governments can be joined to litigation in order for them to provide certain information in relation to alternative accommodation and their ability to provide such if evictions are inevitable. Secondly, county governments may have direct, substantial and material interests in eviction matters and the Constitution can be reformed to obligate them to provide alternative accommodation and play the role of mediation between the property owners, the occupiers and the State. Thirdly, the Constitution and legislation in Kenya can be reformed to join county governments as party to the eviction proceedings in cases where occupiers may be rendered homeless due to evictions.

[52] The Community Land Act 27 of 2016.

[53] Ibid Section 2.

[54] The Judicature Act Cap 8 Laws of Kenya Section 3(2) states that 'the Supreme Court, the Court of Appeal, the High Court, the Environment and Land Court, the Employment and Labor Relations Court and all subordinate courts shall be guided by African customary law in civil cases in which one or more of the parties is subject to it or affected by it, so far as it is applicable and is not repugnant to justice and morality or inconsistent with any written law, and shall decide all such cases according to substantial justice without undue regard to technicalities of procedure and without undue delay.'

The thesis recommends incorporation of meaningful engagement within the Kenyan Constitution and legislation and jurisprudence developed by courts in Kenya. Kenya could adopt meaningful engagement and mediation as critical mechanisms during eviction proceedings. Meaningful engagement as a procedural and substantive requirement would be instrumental in addressing the unequal power relations between people living in informal settlements and rural communities, land owners and the State in finding mediated solutions to mitigate arbitrary evictions in Kenya.

The thesis recommends reform in the law to enhance protection of indigenous peoples and other communities in Kenya who do not enjoy formal land tenure. Since informal land tenure has been a major cause of forced evictions, the thesis recommends application of principles such as free prior informed consent and consultations with communities drawing from the South African experience. The two principles are arguably substantive safeguards from arbitrary evictions of indigenous peoples and rural communities.

7.3.3 Constitutional and Legislative Reform to Regulate Evictions

The thesis evaluated land rights and the role of law in protection against forced evictions in Kenya. Protection from forced evictions can be effectively provided through an effective legal and institutional framework. The thesis established that Kenya has made little effort to legislate on forced evictions.[55] The thesis identified that there exists loopholes in the legal framework, which should be sealed in order to realise a legal framework that can protect against forced evictions.

The Constitution provides for the right to housing which is a bulwark against arbitrary evictions.[56] The provision of the right to housing as described in the Constitution has the potential to protect individuals and communities against arbitrary evictions. However, the courts may not necessarily interpret the provision progressively to protect against arbitrary evictions. The right to housing in the Bill of Rights can be utilised because of its potential to protect individuals against forced evictions. This can be achieved through progressive interpretation by the courts.

[55] Section 4.6 of Chapter 4 on the legislation that protects against forced evictions in Kenya.

[56] Republic of Kenya *The Constitution of Kenya* (2010) Article 43 (1) b (hereinafter the Constitution of Kenya). See Section 4.3.2.2 of Chapter 2.

Just as in South Africa, the Constitution should have a provision requiring that no one may be evicted from their home, or have their home demolished, without an order of court made after considering all the relevant circumstances within the Bill of Rights.[57] The Constitution should also make provision succinctly that parliament should not enact legislation that may permit arbitrary evictions. This will ensure that parliament enacts laws that prohibit arbitrary evictions.

Parliament should enact a substantive legislation on eviction that is based on international best practices on evictions. The legislation should incorporate joinder of county governments in all eviction proceedings in court and make them accountable for provision of temporary and alternative accommodation in the event of the intended eviction leading to homelessness. The legislation should incorporate mediation and meaningful engagement between the land owners, the county governments and the illegal occupiers of land. The legislation would assist courts to progressively interpret norms and develop jurisprudence on land rights and forced evictions as evidenced in Chapter 6 of this thesis.

The proposed legislation should repeal the procedural provisions in the Land Laws (Amendment) Act (LLAA) [58] to incorporate both substantive and procedural protection of evictions relating to public, private and community land. The thesis has demonstrated that provisions in LLAA are not adequate to protect occupiers of land against forced evictions. The amendments do not provide that a court order should be a mandatory requirement before evictions. The amendments do not provide for an opportunity of meaningful engagement, supervised by the court, between the owners of the land, the occupiers and the county government. The proposed legislation would however be applicable to evictions within urban areas. Protection from forced evictions within rural areas in respect of communities and indigenous peoples can be achieved through proposed amendments to the CLA.

The CLA should be amended to recognise indigenous peoples and to adopt and incorporate international best practices provided for in the UN Declaration on the Rights of Indigenous Peoples.[59] The CLA should also be amended to incorporate the aspects of free, informed and prior consent of indigenous peoples prior to exploration and exploitation of extractives. This would enable equitable benefit sharing of resources with the indigenous peoples and full

[57] Section 26 of the South African Constitution.
[58] LLAA No. 28 of 2016. See the discussion in Section 4.6 of Chapter 4.
[59] UNGA 'United Nations Declaration on the Rights of Indigenous Peoples' (2011) UN Doc A/RES/66/142.

compensation in case of adverse environmental impact on their land, livelihoods and natural resources arising out of economic activities.

The CLA should make provision for substantive and procedural protection of indigenous peoples against evictions from their land. The thesis appreciates that the Act provides protection to communities by issuing formal title documents for ownership of land to enhance security of tenure. However, the CLA fails to recognise the rights of indigenous peoples and provide for mechanisms for their protection as guided by the ACHPR and the African Commission's Working Group on Indigenous Populations/Communities.[60]

7.3.4 Institutional Reforms

The county governments should be mandated through legislation to deal with evictions within their areas of jurisdiction. The county governments should bear a role in facilitating the determination of whether or not the courts will grant an eviction order through joinder. The legislative provisions should ensure that county governments are responsible for provision of alternative and emergency accommodation in case of evictions. The legislation should contain provisions for county governments to designate land for housing development, plan, facilitate and enable appropriate housing development in their areas of jurisdiction, roles that are currently designated to the national government.[61]

County governments hold unregistered community land on behalf of communities.[62] The 2016 amendment to the Land Act[63] that included aspects on evictions assigned a role to county government in respect of evictions that relate to unregistered community land. The county government executive committee member responsible for land matters is mandated to notify illegal occupiers of unregistered community land of the decision to carry out an eviction.[64] The provision is not clear on what constitutes illegal occupation of unregistered community land or who could be termed as an illegal occupier. The amendments give a

[60] The Commission African is established under Article 30 of the African Charter with the mandate of promotion and protection of human rights in Africa. It was officially inaugurated on 2 November 1987. See the Report of the African Commission's Working Group on Indigenous Populations/ Communities *Extractive Industries, Land Rights and Indigenous Populations'/Communities' Rights, East, Central and Southern Africa* (2017) Adopted by The African Commission on Human and Peoples Rights at its 58th Ordinary Session April 2016, The Gambia [105[-[106].

[61] South African Housing Act 107 of 1997 Section 9 (1). The Act mandates municipalities, as part of their integrated development planning, take all reasonable and necessary steps within the framework of national and provincial housing legislation and policy to ensure access of reasonable housing within their jurisdiction.

[62] The CLA (note 52 above) Section 6.

[63] LLAA (note 58 above).

[64] Ibid Section 152D.

nominal role to county governments instead of making them active participants in eviction proceedings, a role that is critical in ensuring that evictions do not result in homelessness. In that regard, county governments should play substantive roles in eviction proceedings through joinder, meaningful engagement and provision of alternative accommodation.

Parliament should review the role of the National Housing Corporation (NHC)[65] to bring it in line with the devolved system of government.[66] Parliament should extend the jurisdiction of the NHC to include defining the role of county governments in provision of housing and contributing towards the national and county roles in the realisation of the constitutional right to housing. The NHC as an institution under the national government should be given the role of collaboration with the county governments in provision of alternative accommodation upon eviction.

Parliament should mandate the Kenya National Commission on Human Rights (KNCHR)[67] to specifically investigate forced evictions and ensure compliance with international best practices on evictions. Parliament should also assign the Commission on Administrative Justice (CAJ)[68] the role of receiving complaints and investigating non-state actors and private entities who are responsible for arbitrary evictions.

7.3.5 Community Empowerment

The inherent weakness that exists in the institutions of governance and the contradictions that exist in legal frameworks, coupled with lack of organisation and effective participation among those affected, exacerbates conflicts beyond the acts of forcible evictions.[69] This thesis boldly recommends that whereas it may not only be sufficient to enact new, or clean various conflicting, legislations over land rights and forcible eviction, it is imperative to empower individuals and communities with information, participation and representation at the community level.

The process of empowerment involves a conscious effort to develop the capacity of community members to exercise their rights when faced with evictions. Community

[65] NHC is established under Section 3 of the Housing Act Cap 117 Laws of Kenya.
[66] Economic and Social Rights Centre *Assessment of the Realisation of the Right to Housing in Kenya 2011-2012* (2012) 35.
[67] The KNCHR was established by the Kenya National Commission on Human Rights Act 14 of 2011. The mandate of the commission is discussed in Section 5.8.1 of Chapter 5.
[68] The CAJ was established by the Commission on Administrative Justice Act 102A of 2011. The mandate of the commission is discussed in Section 5.8.2 of Chapter 5.
[69] The weaknesses in the institutional framework is discussed in Chapter 5 of this thesis.

empowerment should ensure that implementers understand that the most vulnerable members of society including women, children, the aged and persons with disability may be adversely affected.

7.4 Areas for Further Research

This thesis intends to stimulate debate and research pertaining to the role of the law in protecting individuals and communities from forced evictions. The thesis leaves a scope for in-depth research on several aspects. The thesis confined itself to SERs including the right to housing and the right to property. The thesis also addressed group rights while addressing forced evictions of indigenous peoples. Since forced evictions also affect civil and political rights (CPRs), there is a need for further research on the role of law in protection against forced evictions on CPRs.

The thesis applied relevant international, thematic and regional human rights instruments to the international best practices for protection against forced evictions. The thesis evaluated international and regional jurisprudence and furthermore drew best practices from legislation and jurisprudence from South Africa on the reforms on eviction laws and practices that can inform reforms in Kenya. The thesis did not make a comparative analysis between the norms and practices between Kenya and South Africa. The thesis drew best practices from South Africa that Kenya can learn from in order to protect individuals and communities from forced evictions. There is scope for a comparative analysis on forced evictions between the two jurisdictions and possibly other jurisdictions.

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